85 - 1989

No. .....

Supreme Court, U.S.
FILED
JUN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

CROWN ZELLERBACH CORPORATION,

Petitioner,

v.

INGRAM INDUSTRIES, INC., CHEROKEE INSURANCE CO., AND LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PHILLIP A. WITTMANN
STEPHEN H. KUPPERMAN
C. LAWRENCE ORLANSKY
STONE, PIGMAN, WALTHER, WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for Petitioner Crown Zellerbach Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

107pp

QUESTION PRESENTED

Whether the direct action liability of a marine insurer pursuant to state law may be limited by a policy provision purporting to grant to the insurer the shipowner's statutory right to limit liability under the federal Limitation of Liability Act.

LIST OF PARTIES

1. Those parties listed in the caption.
2. The following are the parent companies, subsidiaries, and affiliates of the petitioner, Crown Zellerbach Corporation:
   - A. Crown Newsprint Sales Corporation
   - B. Forest Terminals Corporation
   - C. Pulp Recycling Northeast Corporation
   - D. Western Transportation Co.
   - E. St. Francis Insurance Company, Ltd.
   - F. Crown Zellerbach Finance NV
   - G. Crown Zellerbach International, Inc.
   - H. Crown Zellerbach AG
   - I. Crown Zellerbach Asia Ltd.
   - J. Crown Zellerbach Europe
   - K. Crown Zellerbach Inter-America, Inc.
   - L. James River Corporation of Virignia, as of May 5, 1986, owns approximately 93% of the outstanding shares of Crown Zellerbach Corporation. Its subsidiaries and affiliates are as follows:
     1. James River Corporation of Virginia
     2. Arkon Corporation
     3. Berlin Mills Railway, Inc.
     4. Coastal Lumber of Mississippi, Inc.
     5. Culter Guard Bridge Export Limited
     6. The Culter Mills Paper Company Limited
     7. G B Papers Limited
     8. Guard Bridge Paper Company Limited

9. Historic Upper Brandon, Inc.
10. James River Acquisition, Inc.
11. James River-DISC, Inc.
12. James River Finance, Inc.
13. James River Foreign Sales, Inc.
14. James River Graphics Limited
15. James River International Holdings, Ltd.
16. James River-Marathon Ltd.
17. James River-New Hampshire Electric, Inc.
18. James River-Norwalk, Inc.
19. James River Paper Company, Inc.
20. James River-Pepperell, Inc.
21. James River-Rochester, Inc.
22. James River Subsidiary Corporation
23. James River-Texas, Inc.
24. James River-U.K. Holdings, Ltd.
25. James River U.S. Holdings, Inc.
26. Meridian & Bigbee Railroad Company
27. Nashua River Reservoir Company
28. Riegel Products Corporation
29. Riverside Transportation, Inc.
30. Scotflow Limited
31. Smith & McLaurin Limited
32. Upper Brandon Farms, Inc.
33. Upper Brandon Training Center, Inc.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

I. STATEMENT OF THE CASE 3

1. Preliminary Statement 3

2. Proceedings Below 3

II. REASONS FOR GRANTING THE WRIT 6

A. The Decision Of The Lower Court Is In Conflict With A Prior Decision Of This Court 6

B. The Decision Below Determines An Issue Of Louisiana Law In A Manner Contrary To Louisiana Jurisprudence 9

C. The Decision Below Creates A Conflict Among Federal Courts 14

D. The Decision Below Adversely Affects Important State Interests 15

CONCLUSION 17

APPENDIX A-1

TABLE OF AUTHORITIES

Pages

CASES:

Alcoa S.S. Co. v. Charles Ferran & Co., 251 F. Supp. 823 (E.D. La. 1966), *aff'd*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968) 10

Coleman v. Jahnke Service, Inc., 341 F.2d 956 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966) 7

Crown Zellerbach Corp. v. Ingram Industries, Inc., 783 F.2d 1296 (5th Cir. 1986) 2

Crown Zellerbach Corp. v. Ingram Industries, Inc., 745 F.2d 995 (5th Cir. 1984) 2

Crown Zellerbach Corp. v. Ingram Industries, Inc., No. 79-93-B (M.D. La. Oct. 28, 1982) 2

Cushing v. Maryland Casualty Co., 198 F.2d 536 (5th Cir. 1952) 6

Cushing v. Texas & P. Ry. Co., 99 F. Supp. 681 (E.D. La. 1951) 6

Danzy v. United States Fidelity & Guaranty Co., 380 So.2d 1356 (La. 1980) 10, 13

Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935) 12, 16

Ex parte Tokio Marine & Fire Insurance Co., 322 F.2d 113 (5th Cir. 1963) 7

Harvey v. New Amsterdam Casualty Co., 6 So.2d 774 (La. App. Orl. 1942) 11, 12

In Re: Independent Towing Co., 242 F. Supp. 950 (E.D. La. 1965) 12, 13

Lusk v. United States Fidelity & Guaranty Co., 199 So. 666 (La. App. Orl. 1941) 12

TABLE OF AUTHORITIES—Continued

Pages

Lintz v. M/T Aphrodite B, 561 F. Supp. 424 (E.D. La. 1983) 13

Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954) 6, 7, 8, 9, 14, 16

McDowell v. National Surety Corp., 68 So.2d 189 (La. App. 1st Cir. 1953) 12

Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970) 5, 8, 13, 14, 15

Paimer v. Edwards, 156 So. 781 (La. App. 1st Cir. 1934) 11

Ramos v. Continental Insurance Co., 493 F.2d 329 (1st Cir. 1974) 14

Shaw v. New York Fire & Marine Underwriters, Inc., 252 La. 653, 212 So.2d 416 (1968) 10

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 15

Torres v. Interstate Fire and Casualty Co., 275 F. Supp. 784 (D.P.R. 1967) 7, 14

Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) 16

Wertz v. Estes, 402 So.2d 166 (La. App. 1st Cir. 1981) 10

STATUTES:

15 U.S.C. § 1011, *et seq.* 15

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1332 4

28 U.S.C. § 1333 4

TABLE OF AUTHORITIES—Continued

Pages

28 U.S.C. § 2101(c) 2
46 U.S.C. § 183, *et seq.* 3
46 U.S.C. § 183(a) 2, 4
La. R.S. 22:655 ..... 2, 4
La. Civ. Code art. 1801 ..... 2, 10
Supreme Court Rule 20 2

No. .....

In The

Supreme Court of the United States

October Term, 1985

CROWN ZELLERBACH CORPORATION,

Petitioner,

v.

INGRAM INDUSTRIES, INC., CHEROKEE INSURANCE CO., AND LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on March 5, 1986.

OPINIONS BELOW

The opinion on rehearing *en banc* of the United States Court of Appeals for the Fifth Circuit ("court of appeals")

issued on March 5, 1986, and is reported as *Crown Zellerbach Corporation v. Ingram Industries, Inc., et al.*, 783 F.2d 1296 (5th Cir. 1986). It appears in the Appendix commencing at page A-1. The original court of appeals panel opinion is reported as *Crown Zellerbach Corporation v. Ingram Industries, Inc., et al.*, 745 F.2d 995 (5th Cir. 1984), and is reprinted in the Appendix commencing at page A-23. The opinion of the United States District Court for the Middle District of Louisiana, No. 79-93-B (M.D. La. Oct. 28, 1982), is unpublished. It is reprinted in the Appendix commencing at page A-48.

—o—

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1986. This petition for a writ of certiorari was filed within 90 days of March 5, 1986, as is required by 28 U.S.C. § 2101(c) and Rule 20 of the Supreme Court Rules. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

—o—

STATUTORY PROVISIONS

The following statutes, set forth in the Appendix commencing at page A-75, are involved in this case:

46 U.S.C. § 183(a)

La. R.S. 22:655

La. Civ. Code art. 1801

I. STATEMENT OF THE CASE

1. Preliminary Statement

This case presents the issue whether a maritime excess protection and indemnity ("P&I") underwriter sued in a direct action may invoke limitation of liability through a policy provision and thereby benefit from the insured shipowner's right to limit its liability pursuant to the Limitation of Shipowner's Liability Act[1] (the "Limitation Act"). The case arises out of an allision in which a vessel caused severe damage to the Crown Zellerbach ("CZ") water intake structure in the Mississippi River near St. Francisville, Louisiana. The district court entered judgment in favor of the plaintiff CZ, petitioner herein, in a sum which exceeded by $1.8 million the amount to which the vessel owner was permitted to limit its liability. London Steam-Ship Owner's Mutual Insurance Association, Limited ("London Insurance"), the excess P&I insurer, was held solely liable for the excess amount. The original appellate panel affirmed (App. at p. A-23), but the court of appeals on rehearing *en banc* reversed (App. at p. A-1), overruling a prior appellate court decision and absolving the insurer of liability for amounts in excess of the limitation fund.

2. Proceedings Below

The bareboat charterer of the vessel at fault, Ingram Industries, Inc. ("Ingram"), obtained two P&I covers to protect itself against claims for damage to fixed structures.

---

[1] 46 U.S.C. § 183, *et seq.*

The primary underwriter provided a policy with a maximum coverage of $1 million. The excess coverage was obtained from London Insurance. Shortly after the allision, CZ instituted this suit for damages against Ingram and the insurers. The insurers were named defendants pursuant to the Louisiana Direct Action Statute,[2] which permits an injured party to bring a direct action against a liability insurer for Louisiana-incurred damages. Jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332, and on the admiralty and maritime jurisdiction of the district court, 28 U.S.C. § 1333.

In its answer Ingram sought, and ultimately was permitted, limitation of its liability to the value of the vessel plus freight then pending.[3] London Insurance contended that its liability also should be so limited, purportedly relying upon a provision of the policy issued to Ingram, which states in pertinent part:

> When a Member for whose account a ship is entered in this Class, is entitled to limit his liability, the liability of the Class shall not exceed the amount of such limitation. . . .

The district court rendered judgment, *inter alia,* against London Insurance for the amount of damage sustained by CZ in excess of the limitation fund. In apparent reliance upon principles established in state and federal jurisprudence, the court succinctly stated:

> It is too well settled for citation that the insurers are not entitled to limit their liability to the amount of the

---

2 La. R.S. 22:655. *See* App. at p. A-75.

3 46 U.S.C. § 183(a).

> limitation fund set by the court. The limitation of liability is personal to the insured. Thus, the insurers' request for limitation of liability is denied.
>
> App. at p. A-52 - A-53.

The original appellate panel affirmed in a *per curiam* opinion, determining that the district court was correct in holding the P&I underwriter liable for the excess amount. The panel expressly relied upon the prior Fifth Circuit holding in *Olympic Towing Corp. v. Nebel Towing Co.*[4] that limitation of liability is a defense personal to the shipowner that may not be invoked by a marine insurer in a direct action. Judge Thornberry, concurring specially and joined by the late Judge Tate, noted that the London Insurance policy provision merely constitutes an attempt "to do indirectly . . . precisely what *Nebel Towing* held the insurer could not do directly." (App. at p. A-29).

Rehearing *en banc* was granted, and the court of appeals reversed the panel opinion. The *en banc* court initially suggested that this case is distinguishable from *Nebel Towing,* in that *Nebel Towing* concerned the shipowner's statutory right to limit, while this action involves a policy provision purporting to provide that right. (App. at p. A-8). Nevertheless, the court expressly overruled *Nebel Towing* and reversed the district court with respect to the liability of London Insurance for amounts in excess of Ingram's limited liability. (App. at p. A-18).

———o———

[4] 419 F.2d 230 (5th Cir. 1969), *cert. denied,* 397 U.S. 989 (1970).

II. REASONS FOR GRANTING THE WRIT

A. The Decision Of The Lower Court Is In Conflict With A Prior Decision Of This Court

The decision below is in conflict with this Court's decision in *Maryland Casualty Co. v. Cushing.*[5] Accordingly, a writ of certiorari should issue to review the decision of the court of appeals.

Cushing involved a direct action against the liability underwriters of the owner and charterer of a ship involved in a maritime accident which resulted in the death of five seamen. The owner and charterer previously had filed petitions in admiralty to limit their liability under the Limitation Act. The district court granted summary judgment against the direct action plaintiffs, holding that the Louisiana statute is inapplicable in a maritime context because the invocation of that state statute would conflict with the purpose of the federal Limitation Act.[6] The court of appeals reversed, holding that the direct action statute is not in conflict with federal law.[7] This Court resolved a potential conflict between the state and federal legislation by permitting the direct action to adjudicate the measure of recovery against the insurers by the plain-

---

5 347 U.S. 409 (1954).

6 *Cushing v. Texas & P. Ry. Co.*, 99 F. Supp. 681 (E.D. La. 1951).

7 *Cushing v. Maryland Casualty Co.*, 198 F.2d 536 (5th Cir. 1952).

tiffs, but requiring that such action procedurally be continued until after completion of the limitation proceeding.[8]

In expressly refusing to declare the Louisiana law invalid, this Court "definitively decided that the Louisiana direct action statute and the public policies of Louisiana embodied therein provided the measure of recovery against an insurance company that had insured a vessel involved in a maritime accident, regardless of the liability limits of the Limitation of Liability Act.'"[9]

In direct contrast to *Cushing*, the court below effectively has invalidated the Louisiana statute in a maritime context by permitting marine insurers to invoke the vessel owner's statutory limitation right. Unlike the injured claimants in *Cushing*, recovery by CZ in this case has been restricted to the limitation fund, despite proper institution of a direct action in accordance with procedural requirements consistent with those endorsed by this Court. The result is one this Court refused to require in *Cushing*.

The majority in the appellate court to some extent attempts to justify its holding by stating that limitation

---

[8] Although *Cushing*, a 4-1-4 decision, has been described as a "riddle," *Ex Parte Tokio Marine & Fire Insurance Co.*, 322 F.2d 113, 114 (5th Cir. 1963), and "a grisly spectre of undefined size and shape," *Coleman v. Jahnke Service, Inc.*, 341 F.2d 956, 957 (5th Cir. 1965), *cert. denied*, 382 U.S. 974 (1966), the late Judge Tate more properly observed that the Supreme Court holding is clear and that it is difficult to conclude that the *Cushing* decision is confusing. (App. at p. A-20 n.1).

[9] (App. at p. A-19 - A-20) (Tate, J., dissenting). *See also Torres v. Interstate Fire and Casualty Co.*, 275 F. Supp. 784, 787 (D.P.R. 1967) (unavailability of limitation to an insurer in a direct action is "clearly deducible" from *Cushing*).

here is sought pursuant to a *policy* provision, rather than pursuant to the shipowner's *statutory* right to limit liability. Such distinction, however, is one without a difference, and merely serves to champion form over substance. Indeed, that a policy provision purports to limit an insurer's liability to the amount to which the insured is permitted to limit its liability does not alter the fact that the insurer is effectively circumventing the direct action statute for the purpose of invoking the Limitation Act in its favor.[10] The policy provision itself constitutes an attempt to accomplish indirectly that which this Court previously has proscribed.[11]

Contrary to *Cushing*, the court of appeals here renders the direct action statute inapplicable to a marine insurer in all cases where a shipowner is permitted to limit liability. The court thus relies upon the Limitation Act, rather than upon the direct action statute, to provide the measure of recovery in actions against insurers. All nine members of this Court recognized in *Cushing* that the Limitation Act was designed to protect shipowners, not insurers.[12] The decision below runs counter to that de-

---

10 The Fifth Circuit recognized as much by finding it necessary to overrule *Nebel Towing*, despite the purported distinction between statutory and policy defenses.

11 The provision here at issue first surfaced in London Insurance policies in 1955, one year after the *Cushing* decision. (App. at p. A-8). It clearly was designed to circumvent the holding of the Court.

12 *See Cushing*, 347 U.S. at 615 (Frankfurter, J., joined by Reed, Jackson, and Burton, JJ.), 615-16 (Clark, J., concurring), and 618 (Black, J., dissenting, joined by Warren, C.J., Douglas, and Minton, JJ.).

termination, permitting an insurer to gain advantage from a statute not designed for its benefit.

The decision to grant certiorari in *Cushing* was based upon this Court's view that the issue presented was "important to the proper enforcement of the Limitation Act."[13] The issue presented in this case is equally important to the proper enforcement of the Limitation Act, and the doubt which the court of appeals has cast on the vitality of the *Cushing* decision[14] makes the granting of certiorari in this case especially appropriate. A writ of certiorari should issue to consider the judgment below in light of this Court's *Cushing* decision.

B. The Decision Below Determines An Issue Of Louisiana Law In A Manner Contrary To Louisiana Jurisprudence

The holding of the court of appeals contravenes Louisiana jurisprudence on an issue of Louisiana law. The finding that a statutory defense personal to the insured nevertheless may be raised by an insurer through a policy provision is contrary to Louisiana state court decisions. The determination that, in any event, limitation of liability is not a defense personal to the insured which therefore may be asserted by an insurer also conflicts with the great weight of Louisiana state and federal jurisprudence. Finally, the specific holding of the court below directly conflicts with a recent pronouncement of the court of last resort in Louisiana.

---

13 *Cushing*, 347 U.S. at 610.

14 (App. at p. A-21) (Tate, J., dissenting).

It is undisputed that the Louisiana Direct Action Statute is applicable to this case. That statute under certain circumstances authorizes an injured person to bring an action directly against an insurer. The effect of the statute is to make the insurer solidarily liable with its insured.[15] Accordingly, the Louisiana rule governing solidary obligors are routinely applied in direct action cases.[16] One such rule limits the defenses available to a solidary obligor. Article 1801 of the Louisiana Civil Code, formerly article 2098, provides:

> A solidary obligor may raise against the obligee defenses that arise from the nature of the obligation, or that are personal to him, or that are common to all the solidary obligors. *He may not raise a defense that is personal to another solidary obligor.*
>
> (Emphasis supplied).

The codal provision requires that a distinction be drawn between those defenses which are "personal" and those which "arise from the nature of the obligation." La. Civ. Code art. 1801. The premise common to all personal defenses is that the defense has been granted to "all members of [a] class as a matter of public policy."[17] A personal

---

15 *Danzy v. United States Fidelity & Guaranty Co.*, 380 So.2d 1356 (La. 1980); *Shaw v. New York Fire & Marine Underwriters, Inc.*, 252 La. 653, 212 So.2d 416 (1968).

16 *Danzy v. United States Fidelity & Guaranty Co.*, 380 So.2d 1356 (La. 1980); *Wertz v. Estes*, 402 So.2d 166 (La. App. 1st Cir. 1981).

17 *Alcoa S.S. Co. v. Charles Ferran & Co.*, 251 F. Supp. 823, 831 (E.D. La. 1966), *aff'd*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

defense "attaches to the status" of an individual, and a person is permitted to invoke such a defense because of that status.[18] Those who do not enjoy the same "status" may not invoke the same defense.

Recognizing that the insurer cannot avail itself of the insured's personal defense by operation of law, the Fifth Circuit here suggests that an insurer nonetheless may avail itself of its insured's personal defense by operation of a policy provision. In so determining, however, the court of appeals fails to follow Louisiana jurisprudence.

Louisiana courts have refused to permit an insurer to benefit from an insured's personal defense simply by inserting a policy provision purporting to grant that right. In *Harvey v. New Amsterdam Casualty Co.*,[19] the plaintiff brought a direct action against her husband's liability insurer, alleging that the automobile accident in which she was injured was caused by her insured husband's negligence. The defendant insurer contended that the plaintiff could not bring a tort action against her husband[20] and, therefore, that she could not sue his insurer for damages resulting from his negligence. The defendant relied upon a clause in the policy expressly providing that the insurer's liability is limited to amounts for which the insured is obligated "by reason of the liability imposed upon him

---

18 *Id.*

19 6 So.2d 774 (La. App. Orl. 1942).

20 Established Louisiana law prevented a wife from suing her husband in tort. *See Palmer v. Edwards,* 156 So. 781 (La. App. 1st Cir. 1934).

by law . . . ."[21] Adhering to the Louisiana Supreme Court decision in *Edwards v. Royal Indemnity Co.*,[22] the court held that the insurer could not avail itself of the husband's personal defense. The court thus refused to permit an insurer contractually to transform into its own a defense otherwise personal to its insured.[23] By suggesting that defenses personal to an insured can be asserted by the insurer solely because of contract, the opinion below is contrary to established state law.

Perhaps recognizing the fallacy of this statute-contract distinction, the Fifth Circuit majority here ultimately declares that limitation of liability is not a personal defense under state law and, therefore, that it may be invoked by the insurer. (App. at p. A-14). That determination, however, also is contrary to Louisiana law. Louisiana state courts, as well as federal courts sitting in Louisiana, have acknowledged that limitation of liability is a defense personal to the insured which may not be asserted by an insurer in a direct action. In *In Re: Independent Towing Co.*,[24] for example, a vessel's underwriters had been made defendants in certain civil actions brought by victims of a maritime casualty. In an effort to resolve the issue whether the P&I insurer could avail itself of the shipowner's limitation right, the court noted the historic

---

21 *Harvey*, 6 So.2d at 775.

22 182 La. 171, 161 So. 191 (1935).

23 *See also McDowell v. National Surety Corp.*, 68 So.2d 189 (La. App. 1st Cir. 1953) (refusal to construe similar policy provision as permitting insurer to benefit from personal defense); *Lusk v. United States Fidelity & Guaranty Co.*, 199 So. 666 (La. App. Orl. 1941).

24 242 F. Supp. 950 (E.D. La. 1965).

role of limitation as an inducement to financial involvement in maritime commerce. The court observed that the defense historically developed as a personal one particular to the shipowner and that it became available to the shipowner:

> strictly by virtue of his individual status as a capital investor in maritime commercial activity. In this capacity the shipowner became invested with a certain defense *personal to him and to him alone.*
>
> *Id.* at 952. (Emphasis added).

Similarly, in *Lintz v. M/T Aphrodite B*,[25] a federal district court sitting in Louisiana refused to uphold a policy provision purporting to permit the insurer to benefit from the insured vessel owner's limitation of liability. The court noted that enforcement of the policy provision "would defeat the purpose of the Limitation Act," and held that "limitation of liability is a defense which cannot be availed of by an insurer under Louisiana law."[26]

The court of appeals also has failed to adhere to a recent pronouncement of the Louisiana Supreme Court. In *Danzy v. United States Fidelity & Guaranty Co.*,[27] the Louisiana Supreme Court surveyed the Louisiana cases that address the issue of personal defenses and their availability to an insurer in a direct action. The court therein cited with approval the *Nebel Towing* holding that limitation of liability is a defense personal to the insured.[28]

---

[25] 561 F. Supp. 424 (E.D. La. 1983).

[26] *Id.*, at 426.

[27] 380 So.2d 1356 (La. 1980).

[28] *Id.*, at 1359 n.5.

The citation to *Nebel Towing* by the state supreme court illustrates that the widely accepted view on this state law issue is that the marine insurer may not avail itself of the shipowner's right to limit liability. At least since 1954, when this Court rendered the *Cushing* decision, "the admiralty bench and bar of Louisiana have decided and argued cases" on the basis that the right to limit is unavailable to the insurer in a direct action. (App. at p. A-21) (Tate, J., dissenting). The court below now has overruled *Nebel Towing*, thereby setting forth a holding which runs counter to the pronouncements of the Louisiana courts.

Because the court below has decided a Louisiana state law issue in a manner contrary to the court of last resort in Louisiana, a writ of certiorari should issue to review that decision.

C. The Decision Below Creates A Conflict Among Federal Courts

In *Torres v. Interstate Fire and Casualty Co.*,[29] a federal district court within the First Circuit held that limitation of liability is a defense personal to the insured and, therefore, that an insurer sued under the Puerto Rico direct action statute could not avail itself of that defense. The First Circuit Court of Appeals cited the *Torres* holding with approval in *Ramos v. Continental Insurance Co.*[30] In *Nebel Towing*, the Fifth Circuit reached the identical conclusion under the Louisiana direct action statute.

---

[29] 275 F. Supp. 784 (D.P.R. 1967).

[30] 493 F.2d 329, 333 n.4 (1st Cir. 1974).

The court below, however, has now overruled *Nebel Towing* thereby creating a conflict within the circuits on identical issues. Although the direct conflict is between the decision of a court of appeals and a district court, the district court opinion has been endorsed by another court of appeals. A conflict thus exists on an issue of considerable commercial importance between two circuits which frequently adjudicate maritime cases brought pursuant to direct action statutes.

This direct conflict justifies the grant of certiorari to review the judgment below.

D. The Decision Below Adversely Affects Important State Interests

The decision below, if not reversed, will have a significant adverse effect upon injured claimants who exercise otherwise valid rights under direct action statutes. Because this case affects the traditional authority of states to provide tort remedies for their citizens, a writ of certiorari should issue for its review.[31]

Although marine insurance is a matter within the admiralty and maritime jurisdiction of the federal courts, control of the insurance industry largely has been left to the states pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.* Through its direct action statute, Louisiana has conferred upon injured claimants a method of obtaining relief against insurers and has declared that insurers are solidarily liable with their insureds to such claimants.

---

[31] *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (certiorari granted in part due to significant effect of lower court decision on state tort remedies).

The jurisprudence has given effect to the Louisiana public policy that liability insurance is issued primarily for the protection of the public rather than the insured.[32] Indeed, the direct action statute itself provides that its intent is to make clear that all liability policies "are executed for the benefit of all injured persons." (App. at p. A-76). Thus, as between the insured and the injured claimant, Louisiana public policy declares that liability insurance is for the benefit of the latter. In *Cushing*, this Court recognized that, as between the insured and the insurer, liability insurance is designed to benefit the former.[33] The decision below, however, turns topsy-turvy the hierarchy established by Louisiana public policy and this Court, and favors the insurer over the injured party.[34]

The important and legitimate state interests reflected in the direct action statute previously have been noted by this Court:

> Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages.
>
> *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 72 (1954) (upholding constitutionality of direct action statute).

---

32 *See, e.g., Edwards v. Royal Indemnity Co.*, 182 La. 171, 181, 161 So. 191, 195 (1935).

33 *See* note 12, *supra*.

34 Louisiana law declares that the injured claimant is of paramount concern. The Fifth Circuit decision sacrifices the interests of that claimant, as well as the state policy, in favor of the insurer. The decision below thus conflicts with state law. It also conflicts with the unanimous view of this Court as expressed in *Cushing*. *See* note 12, *supra*, and accompanying text.

The decision below violates Louisiana public policy and frustrates the right of the states to regulate the insurance industry and to fashion tort remedies for its citizens. In view of the important policy issues raised by the decision below, a writ of certiorari should issue for its review.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit as prayed by petitioner.

Respectfully submitted,

PHILLIP A. WITTMANN
STEPHEN H. KUPPERMAN
C. LAWRENCE ORLANSKY
STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON
546 Carondelet Street
New Orleans, Louisiana 70130
Telephone: (504) 581-3200

Attorneys for Petitioner
Crown Zellerbach Corporation

A-1

CROWN ZELLERBACH CORPORATION,
Plaintiff-Appellant, Cross-Appellee,

v.

INGRAM INDUSTRIES, INC., et al.,
Defendants-Appellees,

and

London Steam-Ship Owners' Mutual Insurance Association, Limited,
Defendant-Appellee, Cross-Appellant.

No. 82-3749.

United States Court of Appeals, Fifth Circuit.

March 5, 1986.

Appeals from the United States District Court for the Middle District of Louisiana.

Before CLARK, Chief Judge, BROWN, THORNBERRY, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

The sole remaining issue[1] for en banc determination is the validity of the provision of a marine protection and indemnity (P & I) policy fixing the underwriter's maximum liability to that of the assured shipowner's judicially declared limitation of liability. Stated obversely, the question is whether the P & I underwriter is liable in excess

---

1. Although under Rule 7 granting of en banc vacated the panel opinion, the Court, without further discussion, lets stand the panel's ruling on issues 1, 2, 3 and 4 (unpublished, *see* notes * and**), 745 F.2d 995, 996, 998 (5th Cir. 1984).

of the assured shipowner's admitted limited liability. Along the way we will determine the continued vitality of our earlier *Nebel Towing*[2] decision on which the trial court and the panel majority relied. We hold that the underwriter is not liable for the excess and in doing so overrule *Nebel Towing*.

I.

This appeal grows out of an allision on the Mississippi River between the tow in tow of the tug F.R. BIGELOW and Crown Zellerbach's (CZ) water intake structure. Involved also was the tug's (and owners') maritime limitation of liability proceeding in which CZ brought a Louisiana direct action against prime and excess P & I underwriters of the vessel owner/operator. After trial, the District Court held that Ingram Industries, Inc. (Ingram), the tug owner/operator, was liable, but was entitled to limit its liability to the value of the vessel and the pending freight. The excess P & I underwriter was held liable for nearly $2,000,000 of the portion of CZ's damages that exceeded the limited liability of the vessel owner. We approved the trial court's holding of (i) no "privity or knowledge" by the tug owner, (ii) the valuation of the vessel, (iii) the computation of CZ's damages, and (iv) the award of prejudgment interest calculated from a date later than the accident. However, the Court by divided vote determined that the District Court was free of error in holding the tug owner's underwriter liable beyond the dollar limits fixed, or ascertainable, in the P & I policy.

---

2. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 1969 A.M.C. 1571 (5th Cir.1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 and 419 F.2d at 238, Brown, C.J., dissenting from denial of rehearing en banc.

How it All Happened

On February 3, 1979, the tugboat F.R. BIGELOW owned (or bareboat chartered) by Ingram, while pushing 15 loaded barges down the Mississippi River in heavy fog and rain, caused its forward lead barge to collide with and damage CZ's water intake structure, located above Baton Rouge, Louisiana. Shortly after this incident, CZ began to repair the structure, but these repairs were interrupted on May 18, 1979, when another tugboat collided with the structure and damaged the remaining portion. The structure was not rebuilt in kind, but was rebuilt in a different form.

CZ filed suit against the tugboat F.R. BIGELOW, and Ingram, her bareboat charterer, in April of 1979. Subsequently, it amended its complaint to include Cherokee Insurance Company (Cherokee), the prime P & I insurer of Ingram, with a policy limit of $1,000,000, and London Steam-Ship Owners' Mutual Insurance Association (London Steam-Ship), excess P & I insurers of Ingram, with a deductible franchise of $1,000,000.

In its answer to the suit based upon the accident of February 3, 1979, Ingram, the charter-owner/operator of the F.R. BIGELOW, sought litigation of its liability to the value of the vessel plus freight then pending. *See* 46 U.S.C. § 183. Ingram stipulated liability for striking the intake structure, and the issues of damages and limitation of liability were tried. Following trial, the District Court entered judgment for CZ in the "total sum" of $3,948,210.31 with prejudgment interest calculated from December 11, 1980. The District Court granted Ingram's prayer for limitation of liability, valued the vessel at $2,134,918.88, and

limited the owner's liability to that amount. Since Cherokee's prime P & I policy was for $1,000,000, the District Court decreed the total sum of CZ's judgment as follows:

Table I

(a) Total Damages to CZ		$3,948,210.31
(b) Payable by Owner and Cherokee Prime P & I	$1,025,000.00	
(c) Payable by Owner and London Steam Excess P & I	1,109,918.88	
(d) Owner's Limited Liability		2,134,918.88
(e) Balance by London Steam Excess P & I		$1,813,291.44

Following the entry of judgment, Ingram and its two P & I underwriters made payments up to Ingram's limited liability ($2,134,918.88).

London Steam-Ship challenged the portion of the District Court's judgment holding that underwriter liable for the amount ($1,813,291.44) of CZ's claim over and above Ingram's fixed limited liability ($2,134,918.88). The panel, by divided vote, affirmed that holding.

The P & I Coverage

For its protection against claims for damage to piers and other fixed (non-vessel) structures, Ingram, as chartered owner of the tug BIGELOW, had two P & I covers. The prime cover was with Cherokee, with the amount of insurance being specified as $1,000,000. London Steam-Ship, through A. Bilbrough and Company as managers,

dove-tailing Cherokee's cover with a deductible franchise of $1,000,000, supplied an excess P & I cover in accordance with its Rules.

Louisiana Enters the Fray

In what at one time was thought to be the tranquil waters of *Jensen*[3] with its jealous guard of admiralty uniformity unsettled by *Wilburn Boat*[4] and the intrusion of state laws into these sacred waters, our problem comes about by the Louisiana Direct Action statute, La.R.S. 22:655.[5]

---

3. *See Southern Pac. Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917).

4. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955).

5. § 655. *Liability policy; insolvency or bankruptcy of insured; direct action against insurer*

No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, *and an action may thereafter be maintained within the terms and limits of the policy by the injured person,* or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The *injured person* or his or her survivors or heirs hereinabove referred to, at their option, *shall have a right of direct action* against the insurer *within the terms and limits of the policy;* and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in

(Continued on following page)

This statute, as its name implies, allows a direct action against a liability insurer for Louisiana-incurred damages. But the statute does not create new Louisiana liabilities. On the contrary, by its own terms, reinforced by Louisiana judicial decisions, the statute imposes liability on the insurer subject "to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

II.

In our much discussed decision of *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 1969 A.M.C. 1571, *rehearing denied*, 419 F.2d 238 (5th Cir. 1969) (en banc), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970), the Court relied in part on the Louisiana Direct Action Statute to affirm the District Court's award of judgment in excess of the limitation value against the underwriter of the vessel at fault.

(Continued from previous page)

which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. *This right of direct action shall exist* whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and *whether or not such policy contains a provision forbidding such direct action,* provided the accident or injury occurred within the State of Louisiana. *Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State.* It is the intent of this Section that *any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured,* provided the terms and conditions

(Continued on following page)

The P & I policy in *Nebel Towing* did not by its terms limit the insurer's liability to the vessel owner's limited liability. That meant that the P & I underwriter, in its effort to limit its liability, had to contend that as the insurer it had the right to claim the vessel owner's *statutory* right to limit its liability.

In holding the statutory limitation right unavailable to the insurer, the *Nebel Towing* court reasoned as follows: the enigmatic but undeniable *Cushing*[6] decision declined to hold the Louisiana statute to be preempted by the paramount federal maritime power. Therefore, the Court tested the insurer's claim of entitlement to the shipowner's statutory right to limit liability according to the law of Louisiana.

The insurer attempted to rely on a clause in its policy limiting its liability to "such sums as the assured * * * shall have become legally liable to pay and shall have paid on account." This no-action clause, however, directly ran afoul of the Louisiana Direct Action Statute.

> The statute simply voids any policy clause which conditions the right of the injured person to enforce

---

(Continued from previous page)

> of such policy or contract *are not in violation of the laws of this State.*
>
> It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, *for any legal liability said insureds may have as or for a tort-feasor within the terms and limits of said policy.* Amended by Acts 1958, No. 125; Acts 1962, No. 471, § 1.

LA.REV.STAT.ANN. § 22:655 (West 1978) (emphasis added).

6. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806, 1954 A.M.C. 837 (1954).

> against the insurer its contractual obligation to pay the insured's debt upon, as prerequisite, the obtaining by the injured person of a judgment against the insured.

Hidalgo v. Dupuy, 122 So.2d 639, 644-45 (La.App.1960), *quoted in Nebel Towing,* 419 F.2d at 237.

The *Nebel Towing* court also held that the limitation of liability defense was a defense "personal" to the shipowner and could not be availed of by the insurer. *See* LA.CIV.CODE ANN. art. 1801 (West 1985); note 15 *infra.* As we discuss below, this holding was the result of a flawed analogy to Louisiana immunity law and was wholly unnecessary to the *Nebel Towing* decision. *See infra.*

III.

Out of the Fog of Nebel Towing

It is here that we must part ways with *Nebel Towing.* In a nutshell, the distinction between this case and *Nebel Towing* is a simple one. *Nebel Towing* dealt solely with the contention that the P & I underwriter was entitled to the shipowner's *statutory* right to limit liability. *See* note 9 *infra.* Here the claim is quite different: the P & I underwriter is claiming only that, as prescribed by the Louisiana Direct Action Statute, the terms of its own insurance policy limits maximum liability to the dollar amount for which the shipowner-assured would be liable upon successfully maintaining the right to limit its liability. The P & I underwriter is not claiming the *statutory* right of the assured. To the contrary, it is here claiming only the limitation of the insurance policy defense itself. As we explain below, this policy limitation cannot be contrary to Louisiana law nor to the public policy of the state.

London Steam-Ship Coverage

London Steam-Ship (known in the parlance as a "P & I Club")[7] promulgated rules which defined its liabilities and defenses.

The uncontradicted record traces the history of London Steam-Ship Rules from 1881-82, when liability was fixed at 30 per entered ton with a limit of 3000 tons, to 1952-53, when the maximum of 3000 entered tons was deleted. The Club realized that, in this day and time of almost unlimited, astronomical liabilities with aggravated uncertainties as to the shipowner's ability successfully to maintain the statutory right to limit liability and the practical demands of its shipowner members, it was faced with the problem of determining in what manner its total liability exposure could be expressed. Beginning in 1955—long before *Nebel Towing* was decided—this was handled by Rule 8(i):

> When a Member for whose account a ship is entered in this Class, is entitled to limit his liability, the liability of the Class shall not exceed the amount of such limitation. . . .[8]

In sharp contrast to the situation in *Nebel Towing* in which the P & I claimed only the right to a *statutory* de-

---

7. By the deposition of John Hawkes, director of Bilbrough, it is uncontradicted that London Steam-Ship, the "Club," is an association composed of a number of members, all of whom are shipowners, who "severally and individually, not jointly nor in partnership, nor the one for the other of them, but each only in his own name" agree to protect and indemnify *each other* in respect of the vessel entered for protection and indemnity risk in accordance with the Rules of the association.

8. Rule 8(i) continues to cover the situation in which a vessel is entered for part, not full, tonnage:

(Continued on following page)

fense, London Steam-Ship's excess P & I policy by Rule 8(i) has a policy term which limits its liability to that of the owner's limited liability. This is a *policy* not a *statutory* defense. The P & I insurer is not claiming the owner's *statutory* right to a shipowner's limited liability, but merely the right to assert its *policy defense*.[9]

Since there can be no question that Rule 8(i) is one of the ". . . lawful conditions of the policy or contract," it brings us face to face with the critical provision of the Louisiana Direct Action Statute that "any action brought hereunder shall be subject to . . . the *defenses which could be urged by the insurer to a direct action brought by the insured*. . . ."[10]

(Continued from previous page)

. . . or, if the ship is not entered for her full tonnage, such proportion of the said amount as the entered tonnage bears to the gross registered tonnage. . . .

9. The closest the *Nebel Towing* P & I policy came to Rule 8(i) was in the clause quoted in that court's note 22 (see 419 F.2d at 236 and requoted note 17, dissenting opinion, 745 F.2d at 1004) which provided:

> It is expressly understood and agreed *if and when* the assured has *any interest other than as a shipowner* in the vessel named herein, in no event shall this Company be liable hereunder to any greater extent than *if the assured were the sole owner and entitled to petition for limitation of liability* in accordance with present and future law.
>
> (Emphasis added)

This clause applied only to the suppositional situation of the assured having an interest other than as a shipowner in the vessel. This suppositions condition could have had no significance in *Nebel Towing* since it was uncontradicted that the insured vessel was under bareboat charter to the assured which the Court properly considered as an owner. *See* 419 F.2d 230, 231 n. 1.

10. *See supra* note 5. This language is reinforced by other provisions of the statute:

(Continued on following page)

Direct Action

We start with our decisions which today are still very much intact. For example, *see Degelos v. Fidelity & Casualty Co.*, 313 F.2d 809 (5th Cir.1963)[11] and *Tokio Marine & Fire Insurance Co. v. Aetna Casualty Co.*, 322 F.2d 113, 1964 A.M.C. 308 (5th Cir.1963).[12]

The decisions of the Louisiana courts have been as unambiguous as the language of the Direct Action Statute itself: there must be a legal liability on part of the assured

---

(Continued from previous page)

> Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State.
>
> It is also the intent of this Section that all liability policies *within their terms and limits* are executed for the benefit of all injured persons . . . to whom the insured is liable; and that it is the purpose of all liability policies to give protection . . . to all insureds . . . for *any legal liability* said insured[s] may have *as or for a tort-feasor within the terms and limits of said policy*.

(Emphasis added).

11. In *Degelos* we stated:

> *Under the Direct Statute*, the case may proceed against the insurer, but *liability depends on legal liability of the assured*. Whether, as the Act permits, the assured is joined with the insurer, *the standard for recovery is identical*.

313 F.2d at 813 (emphasis added).

12. In *Tokio* we stated:

> And we are now clear that the direct action insurer *stands as a party-litigant* in exactly the *same shoes as the assured*.
>
> . . . . . .
>
> The Louisiana Direct Action Statute emphasizes *that it is the liability of the assured which counts*. *See*, e.g. "It is the intent of this Section that any action brought hereunder shall be *subject to all of the lawful conditions of the policy or contract* and the *defenses which could be urged by the insurer to a direct action brought* by the *insured*. . . ."

322 F.2d at 116-17 & n. 8 (emphasis added).

for the insurer to have a direct action liability. In *Burke v. Massachusetts Bonding & Insurance Co.*, 209 La. 495, 24 So.2d 875 (1946), the question was whether under the law of Mississippi a wife had a right of action against her husband's Louisiana liability insurer for a tort that her husband committed against her in Mississippi. The Louisiana Supreme Court stated:

> The statute does not give plaintiff any more rights than she has under the law of Mississippi. It only furnishes her with a method to enforce in Louisiana whatever rights she has in Mississippi. Since she has no cause of action under the law of Mississippi, necessarily Act No. 55 of 1930 confers upon her no cause of action in Louisiana. The mere fact that under the statute plaintiff was able to obtain jurisdiction against her husband's liability insurer in a direct action in this State does not create, as against her husband, *or as against her insurer,* a substantive cause of action that does not exist under the law of the State where the wrongful act occurred.

24 So.2d at 877 (emphasis added).

See also Ruiz v. Clancy, 182 La. 935, 162 So. 734, 735-36 (1935):

> The statute does not purport to interfere with the right of an insurance company to limit the so-called coverage, "in any policy against liability," to "liability imposed upon him [the assured] by law," as this policy provides. *An insurance company therefore, may* —as the company did in this instance—*limit the coverage, or liability of the company, to pay only such sums as the insured shall become obligated to pay by reason of the liability imposed upon him by law.* The attorney for the insurance company contends that the statute would interfere with the freedom of parties to enter into contracts, and would be therefore unconsti-

> tutional, if it forbade insurers to limit their so-called coverage in liability insurance policies, so as to cover only the legal liability of the insured. The statute does not purport to do that, by merely giving an injured person a right of action against the insurer, and by compelling the insurer to respond—*within the limits of the policy*—to the obligation of the insured.

(Emphasis added).

In the face of these strong precedents, from both Louisiana and this Court, the contrary result reached in *Nebel Towing* cannot stand. The policy provision 8(i) (*see* note 8 and related text) is not couched as a claim to the shipowner's *statutory* right to limit liability. What—and all—it says is that we, the P & I underwriters, will pay up to but not beyond the assured's legal liability. Whatever the assured is liable for we will pay, 100% in full with no discount, but no more.

In the face of such a wholesome economic principle there is nothing in *Nebel Towing* that could lead this Court to say—as did the panel and concurring opinion, 745 F.2d 998,—that this is contrary to public poilcy or, in the words of § 655 "in violation of the laws of [the] state." *See* note 5 *supra*. From the standpoint of Louisiana's concern —reflected in § 655—about the injured victims of a tort, how could an insurance policy be more fair than to say: whatever your (the assured's) liability, we will pay 100% in full without reduction?

And what, from the standpoint of fairness and Louisiana's public policy could be unfair about the P & I policies

expressing the insurer's maximum liability, not in terms of dollars,[13] but rather in words which are plain and readily ascertainable; not in terms of contentions or hopes, but in words of a realized permanent judicial decision?[14]

Nor is there any support to the theory that applying Rule 8(i) is contrary to Louisiana public policy because *Nebel Towing* held the limitation of liability defense "personal" to the shipowner. Influenced greatly by Judge Ellis' lengthy opinion in *Alcoa Steamship Co. v. Charles Ferran & Co.*,[15] the *Nebel Towing* court seized upon the

---

13. Both *Nebel Towing* and the District Court below applied as perfectly valid the dollar limitation prescribed in the P & I policies. For example, the liability of Cherokee, the prime P & I policy, was limited to its stated $1 million coverage (*see* item (b), Table I above). We have obtained and carefully considered all of the record and briefs in *Nebel Towing* including the P & I policy. The P & I policy expressly provided (line 9) that the "amount hereby insured [is] $175,000 as per schedule [of vessels by name as covered], [and] the underwriter . . . hereby undertakes to pay up to the amount hereby insured . . . such sums as the assured, as owner of the [vessel covered] shall become legally liable to pay and shall have paid on account of [enumerated liabilities]." *Nebel Towing* did not impose any liability in excess of the $175,000 policy limit.

14. There are no problematics. The trial court has spoken without doubt: Ingram, the owner and assured, is not liable beyond the value of the tug.

15. 251 F.Supp. 823 (E.D.La.1966), *aff'd*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836, 89 S.Ct. 111, 21 L.Ed.2d 107 (1968). This case did not involve the problem of the Louisiana Direct Action statute *and* the federal limitation of liability act. The question was the validity of the traditional "red letter" clause in the ship repairer contract. This Court affirmed the holding that the clause was valid and effective as a defense resulting from the "nature of the obligation." 383 F.2d 46, 56 (5th Cir.1967). The District Court's opinion concerning the *Cushing* case, "personal defense" and limitation of shipowners liability was dicta.

idea of "personal defense" based on Codal Art. 2098.[16] The *Ferran* opinion listed examples of defenses considered "personal" under Louisiana law which could not be asserted by the insurer in a direct action suit:

> These defenses included infancy, LSA—Rev.Stat. 9: 571 and *Rouley v. State Farm Mutual Automobile Ins. Co.*, 235 F.Supp. 786, 793 (W.D.La.1964); coverture, *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935) and *Dumas v. United States Fidelity & Guaranty Co.*, 241 La. 1096, 134 So.2d 45, 50 (1961); charitable immunity, *Lusk v. United States Fidelity & Guaranty Co.*, La.App. 199 So. 666 (Orleans 1941); and governmental immunity, *Brooks v. Bass*, La.App. 184 So. 22 (Orleans 1938), certiorari denied, November 28, 1938. As succinctly stated in *Simmons v. Clark*, La.App. 64 So.2d 520 (1 Cir.1953), "[p]ersonal defenses are such as infancy, interdiction, coverture, lunacy, bankruptcy and the like." 64 So.2d at 523.

251 F.Supp. at 831. *Nebel Towing* then quoted from that opinion:

---

16. Article 2098, in effect when *Nebel Towing* was decided, stated:

> A codebtor *in solido*, being sued by the creditor, may plead all exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the codebtors.
>
> He cannot plead such exceptions as are merely personal to some of the other codebtors.

LA.CIV.CODE ANN. art. 2098 (West 1977).

This was reenacted as article 1801, effective January 1, 1985.

> A solidary obligor may raise against the obligee defenses that arise from the nature of the obligation, or that are common to all solidary obligors. He may not raise a defense that is personal to another solidary obligor.

LA.CIV.CODE ANN. art. 1801 (West 1985).

> Amongst these apparently varied "personal" defenses, one common denominator is discernible—each person possessing a "personal" defense obtained that defense because the law granted it to all members of his class as a matter of public policy. The personal defense attaches to the status. Hence parents, children, husbands, wives, governmental units, charitable organizations, bankrupts, lunatics, interdicts, vessel owners, and the like possess a defense denied their respective insurers.

419 F.2d at 238.

Not mentioned, but still another common denominator, is that in each of these instances the defense is more than that. The nonliability is an absolute immunity, an immunity extended to each of the respective classes and to all of the members of each class. Seen in that light, it is immediately obvious that the class of "vessel owners" does not belong on Judge Ellis' list.[17] The federal right of limitation of liability has been granted to certain vessel owners under certain circumstances as a matter of federal policy, but it is not an immunity. Even for those who satisfy its requirements, the Limited Liability Act recognizes a liability. All the act does is put a ceiling on damages. More importantly, the privilege is not available for all

---

17. We are unable to find a Louisiana case that has held the federal right to limitation of liability to be a personal defense. In a footnote in *Danzy v. United States Fidelity & Guaranty Co.*, 380 So.2d 1356, 1359 n. 5 (La.1980), the Louisiana Supreme Court mentioned our result in *Nebel Towing* as part of a lengthy survey of personal defenses but did not express its approval or disapproval of that result.

owners or operators of all ships or vessels for all liabilities.[18]

Even for those owners-operators who can qualify for limitation of liability, the limitation provides them with neither an immunity nor an assured defense. To obtain the benefit of the Act the owners must establish a right to it. That involves the always difficult—and often times impossible—burden of establishing that the casualty occurred without the owner's privity and fault, including prevoyage unseaworthiness.[19] The books are filled with hundreds of cases denying limitation of liability.

IV.

Related to the concept of personal defense which serves as an additional ground for our decision is the fact that Rule 8(i) is a defense that is personal to London Steam-Ship. The defense asserted by London Steam-Ship is not a defense of Ingram, its assured. Indeed, London Steam-Ship is not asserting any defense of Ingram, the owner.

As a policy clause, Rule 8(i) is a defense personal to London Steam-Ship, the underwriter as a solidary obligor. Article 2098 allows a debtor to raise all defenses that "are personal to himself," as this policy defense certainly is. *See supra* note 15. London Steam-Ship may raise this

---

18. There are a number of liabilities not subject to limitation. *See* 3 *Benedict on Admiralty* §§ 31-32 (A. Jenner 7th ed. 1985); *see also id.* § 33 (excluding so-called personal contracts which can include warranties, express or implied, as to seaworthiness, charter parties, ship repairers and suppliers).

19. CZ continues to argue on appeal that limitation of liability should have been denied to Ingram.

defense without regard to whether Ingram's right to limit liability is a defense personal to it.

> [I]nsurers may assert defenses which result from the nature of the obligation—contributory negligence, assumption of risk, confusion, collateral estoppel and res judicata, for example, as well as those common to all co-debtors . . . . Additionally, *insurers enjoy and frequently assert defenses personal to themselves, such as coverage, policy limits,* and procurement by misstatement of material facts in the application.

Alcoa Steamship Co. v. Charles Ferran, Inc., 251 F.Supp. 823, 831 (E.D.La.1966), *aff'd*, 383 F.2d 46 (5th Cir.1967), *cert. denied*, 393 U.S. 836, 89 S.Ct. 111, 21 L.Ed.2d 107 (1968) (emphasis added).

This result makes it unnecessary for us to decide whether, in view of the Supreme Court's enigmatic 4-1-4 decision for that day and time only in *Cushing v. Maryland Casualty Co.*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed.2d 806, 1954 A.M.C. 837 (1954), there is yet a final decision on the constitutionality of the Louisiana Direct Action Statute *vis-a-vis* the federal shipowner's limitation of liability statute, 46 U.S.C. § 183 *et seq.*

Conclusion

Nebel Towing is overruled and the District Court is reversed with respect to the liability of London Steam-Ship for amounts in excess of Ingram's limited liability. In all other respects the District Court is affirmed.

REVERSED IN PART, AFFIRMED IN PART.

THORNBERRY, Circuit Judge, specially concurring:

I have had reservations all along about our holding in *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d

230 (5th Cir.1969), *cert. denied,* 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970). *See id.* at 238 (Thornberry, J., voting to grant petition for rehearing en banc). There we held that a shipowner's limitation defense was personal and consequently was not available to the shipowner's insurer sued under the Louisiana direct action statute. In this case, the insurer inserted a provision in the policy that limited its liability under the policy to the amount of the shipowner's liability after limitation. In effect, the insurer sought to do indirectly what *Nebel Towing* prohibited it from doing directly. Unlike the majority, I have no doubt that *Nebel Towing* precluded an insurer from taking advantage of the shipowner's limitation defense merely by inserting a clause in the insurance policy. *See Crown Zellerbach Corp. v. Ingram Industries,* 745 F.2d 995, 998-99 (5th Cir.1984) (Thornberry, J., specially concurring). The district court was correct in concluding, on the force of *Nebel Towing,* that London Steam-Ship was liable beyond Ingram's limitation amount.

Today, the court en banc overrules *Nebel Towing.* Although I find Judge Tate's dissent persuasive, I join the majority opinion only to the extent that it overrules *Nebel Towing* on the ground that limitation is not a personal defense under Louisiana law.

TATE, Circuit Judge, with whom ALVIN B. RUBIN, POLITZ, JOHNSON and JERRE S. WILLIAMS, join, dissenting:

Almost thirty years ago, in 1954, the Supreme Court of the United States definitely decided that the Louisiana direct action statute and the public policies of Louisiana embodied therein provided the measure of recovery against an insurance company that had insured a vessel

involved in a maritime accident, regardless of the liability limits of the Limitation of Liability Act. *Maryland Casualty Company v. Cushing,* 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954).[1]

Fifteen years ago, this court held that the Limitation of Liability Act provides a personal defense to a vessel owner that, under Louisiana law, is not available to a vessel's insurer in a suit brought under Louisiana's direct action statute. *Olympic Towing Corporation v. Nebel Towing Company, Inc.,* 419 F.2d 230 (5th Cir.1969), *cert. denied,* 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970). The basis for the court's decision was that the defense was personal to the vessel owner because permitting the insurer to take advantage of the shipowner's right to limit his liability would have impermissibly thwarted the public policies embodied in the Louisiana direct action statute. *Nebel Towing,* 419 F.2d at 238.

---

1. *Cushing* involved an attempt to recover damages for the death of five seamen who drowned in a maritime accident. The plaintiffs sued the liability underwriters of the owner and charterer of the ship. Meanwhile, the owner and charterer of the vessel filed a petition in admiralty to limit their liability under the provisions of the Limitation of Liability Act. The federal district court had decided that federal law and the policies underlying the Limitation of Liability Act governed, and refused to give effect to Louisiana's direct action statute. *Cushing v. Texas & P. Ry. Co.,* 99 F.Supp. 681 (E.D.La.1951). The Fifth Circuit held, instead, that Louisiana's direct action statute governed, and that the plaintiffs could proceed against the insurer within the terms and limits of the policy. *Cushing v. Maryland Casualty,* 198 F.2d 536 (5th Cir.1952). A four-member plurality plus Justice Clark's concurrence affirmed this principal ruling of the circuit court. 347 U.S. at 427, 74 S.Ct. at 618. A four-member plurality opinion authored by Justice Frankfurter would have affirmed the district court. The writer finds difficulty in concluding that this ruling was "confusing."

For the past fifteen to thirty years, the admiralty bench and bar of Louisiana have decided and argued cases on the basis of the principles established by these decisions. Additionally, insurance policies have been sold and rates determined on the basis of the principles they embody.

Just recently, the Supreme Court of Louisiana cited *Nebel Towing* with approval in connection with a determination of which personal defenses are not available to an insurer in a direct action. *Danzy v. United States Fidelity & Guaranty Co.*, 380 So.2d 1356, 1359 (La.1980). The only federal reported decision, other than *Nebel Towing*, dealing with the direct action statute of a territorial unit of the United States has likewise concluded that, under the Puerto Rico direct action statute, an insurer cannot avail itself of defenses personal to its insured, including the defense of limitation of liability, and may be held liable up to the full amount for which it has received premiums. *Torres v. Interstate Fire and Casualty Company*, 275 F.Supp. 784 (D.Puerto Rico 1967), cited with approval by *Ramos v. Continental Insurance Company*, 493 F.2d 329, 333 & n. 4 (1st Cir.1974).

Nevertheless, despite this overwhelming authority, the majority's opinion chooses at this late date to overrule *Nebel Towing* and to cast doubt on the vitality of the United States Supreme Court's decision in *Maryland v. Cushing*. For whatever virtues there may be to the theory that "Admiralty is Ancient and Admiralty is Different," *Merchants National Bank of Mobile v. The Dredge General G.L. Gillespie*, 663 F.2d 1338, 1353 (5th Cir.1981) (Tate, J., dissenting), *cert. dismissed*, 456 U.S. 966, 102 S.Ct. 2263, 72, L.Ed.2d 865 (1982), there is no warrant, in view of the United States Supreme Court's definitive ruling, for this

court, at this late stage, to override the public policy and the laws of the State of Louisiana.

The majority to some extent relies upon an attempt to say that its present holding is based upon the insurance contract provision rather than the owner's personal defense of limited liability. This reasoning was rejected by the Louisiana immunity decisions cited by the majority, which are to the effect that under the direct action statute an insurer could not limit its liability for up to its policy limits by a contract clause providing that its contract insured only those amounts for which the insured himself could be held liable.

Under its terms, the present insurance contract covered the entire loss, as held by the district court. To permit the insurer by its contract clause to invoke the *owner's* statutory limitation of liability, a defense personal of the owner, thwarts Louisiana's policies incorporated in its direct action statute no less than if the insurer had attempted to invoke directly the owner's personal defense of statutory limitation of liability. It contravenes as much the holding of the United States Supreme Court in *Maryland Casualty Company v. Cushing, supra,* that Louisiana's direct action policies outweigh federal limitation of liability policies, for the majority to permit the insurer by language quibbles in its contract to reduce nevertheless the full loss-coverage afforded by its contract only to that for which the owner-insured can be held liable by reason of the invocation of the owner's personal defense based upon the Limitation of Liability Act.

For these reasons, I respectfully dissent.

CROWN ZELLERBACH CORPORATION,
Plaintiff-Appellant Cross-Appellee,

v.

INGRAM INDUSTRIES, INC., et al,
Defendants-Appellees,

and

London Steam-Ship Owners' Mutual Insurance Association, Limited, Defendant-Appellee Cross-Appellant.

No. 82-3749.

United States Court of Appeals, Fifth Circuit.

Nov. 9, 1984.

Opinion on Granting Rehearing En Banc Jan. 21, 1985.

Appeals from the United States District Court for the Middle District of Louisiana.

Before BROWN, THORNBERRY, and TATE, Circuit Judges.

PER CURIAM:

What took 16 years for our answer in *Nebel Towing*[1] to the enigmatic 4-1-4 riddle of the *Jane Smith*[2], is now back again in part 13 years later. Based presumably on *Nebel Towing* the District Court granted judgment against the excess P & I Underwriter for nearly $2,000,000 in

---

1. *Olympic Towing Corp. v. Nebel Towing Co., Inc.*, 419 F.2d 230, 1969 A.M.C. 1571 (5th Cir. 1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970); *see id.*, 419 F.2d at 238 (Brown, C.J., dissenting from denial of rehearing en banc).

2. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806, 1954 A.M.C. 837 (1954).

excess of the owner's judicially declared limited liability. Faithful as we are and must be to *Nebel Towing*, the Court, by divided vote holds that the trial court was correct in this judgment and we affirm as to this issue.* As to all other issues the Court unanimously affirms the judgment of the District Court.

This appeal grows out of an allision between the tow in tow of the tug F.R. BIGELOW and Crown Zellerbach's (CZ) water intake structure on the Mississippi River above Baton Rouge. Involved also was the tug's (and owners') maritime limitation of liability proceeding in which CZ brought a Louisiana direct action against the prime and excess P & I Underwriters of the vessel owner/operator. After trial, the District Court held that Ingram, the tug owner/operator, was liable, but was entitled to limit its liability to the value of the vessel and the pending freight. The excess P & I underwriter was held liable for nearly $2,000,000 of the portion of the CZ's damages that exceeded the limited liability of the vessel owner. We find no error in the court's holdings (i) of no "privity or knowledge" by the tug owner, (ii) the valuation of the vessel, (iii) the computation of CZ's damages, and (iv) the award of pre-

---

* Only this issue has precedential value. Local Rule 47.5 provides

> The publication of opinions that have no precedential value and merely decide particular cases on the bases of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.

Pursuant to that Rule the Court has determined that the non-precedential portions of this opinion should not be published. The places at which the published opinion omits parts of the lengthy unpublished opinion are specifically indicated by an **.

judgment interest from a date later than the accident. However, the Court by divided vote determines that the District Court was free of error in holding the tug owner's underwriter liable beyond the dollar limits fixed, or ascertainable, in the P & I policy. Accordingly, we affirm.

How it All Happened

On February 3, 1979, the tugboat F.R. BIGELOW owned (or bareboat chartered) by Ingram Industries, Inc. (Ingram), while pushing 15 loaded barges down the Mississippi River in heavy fog and rain, caused its forward lead barge to come into contact with and damage Crown Zellerbach's (CZ) water intake structure, on the Mississippi above Baton Rouge. Shortly after this incident, CZ began to repair the structure, but these repairs were interrupted on May 18, 1979, when another tugboat collided with the structure and damaged the remaining portion. The structure was not rebuilt in kind, but was rebuilt in a different form.

Suit was filed by CZ against the tugboat F.R. BIGELOW, and Ingram, her bareboat charterer, in April of 1979. Subsequently, the complaint was amended to include Cherokee Insurance Company, the prime P & I insurer of Ingram, with a policy limit of $1,000,000, and London Steam-Ship Owners' Mutual Insurance Association, excess P & I insurers of Ingram, with a deductible franchise of $1,000,000.

In its answer to the suit based upon the accident of February 3, 1979, Ingram, the chartered-owner/operator of the F.R. BIGELOW sought limitation of its liability to the value of the vessel plus freight then pending. 46

U.S.C. § 183. Ingram stipulated liability for striking the structure, and the issues of damages and limitation of liability were tried. Following trial, the District Court entered judgment in favor of CZ in the "total sum" of $3,948,210.31, with pre-judgment interest from December 11, 1980. The District Court granted Ingram's prayer for limitation of liability, valued the vessel at $2,134,918.88 and limited the owner's liability to that amount. Cherokee's prime P & I policy was for $1,000,000. In tabular form, the District Court decreed the total sum of CZ's judgment as follows:

(a) Total Damages to CZ		$3,948,210.31
(b) Payable by Owner and Cherokee Prime P & I	$1,025,000.00	
(c) Payable by Owner and London Steam Excess P & I	1,109,918.88	
(d) Owner's Limited Liability		2,134,918.88
(e) Balance by London Steam Excess P & I		$1,813,291.44

Following the judgment, Ingram and its two P & I underwriters made payments up to the limits of Ingram's fixed liability ($2,134,918.88).

On appeal, CZ raises several issues as errors in the District Court's judgment, all of which we affirm. Lon-

don Steam-Ship Owners' Mutual Insurance Association challenges that portion of the District Court's judgment holding that underwriter liable for the amount ($1,813,291.44) of the plaintiff's claim over and above Ingram's fixed limited liability ($2,134,918.88). Affirming the District Court by a divided vote on that issue obviously warrants publication of our opinion.

1.

*Limitation of Liability***

2.

*Limitation: Valuation of the Vessel***

3.

*Effect of Stipulation of Damages***

4.

*Pre-Judgment Interest***

5.

P & I Underwriter Liable in Excess Limited Liability Amount

For its protection against claims for damage to piers and other fixed (non-vessel) structures, Ingram, as chartered owner of the tug BIGELOW had two P & I covers. The prime cover was with Cherokee, the amount of insurance being specified as $1,000,000. London Steam-Ship Owners' Mutual Insurance Association, Ltd. (London Steam-Ship), through A. Bilbrough and Company, as man-

---

**Not to be published. See note * *supra*.

agers, dove-tailing Cherokee's cover with a deductible franchise $1,000,000 supplied an excess P & I cover in accordance with the Rules of the Association.

Without specific articulation of the reasons for its decision, the trial court — obviously feeling bound by *Nebel Towing* — held the P & I underwriter liable for approximately $2,000,000 more than the owner's limited liability.

Despite the dissent to the denial of rehearing en banc in *Nebel Towing* and criticism of that opinion[3] we are bound by that decision and to justify a different result in this case the Court would have to demonstrate that this case and the rationale presented here is different from that in *Nebel Towing*.

Unable to find any valid distinction and bound by *Nebel Towing*, we are both bound and persuaded that the District Court was correct in holding the P & I underwriter liable for this excess amount.

Conclusion

The upshot is that the Court affirms the holding of the District Court.

AFFIRMED.

THORNBERRY, Circuit Judge, with whom TATE, Circuit Judge, joins, concurring specially:

---

3. *See* Biezup & Abeel, *The Limitation Fund And Its Distribution*, 53 Tul.L.Rev. 1185 (1979); Buglass, *Limitation of Liability From A Marine Insurance Viewpoint*, 53 Tul.L.Rev. 1364 (1979); Kierr, *The Effect Of Direct Action Statutes On P & I Insurance, On Various Other Insurances Of Maritime Liabilities, And On Limitation Of Shipowner's Liability*, 49 Tul.L.Rev. 638 (1969).

While I agree the district court should be affirmed, I write specially to say why *Nebel Towing* is still the law and applies in this case.

In *Nebel Towing* we held that under the public policy of Louisiana expressed in its Direct Action statute, "limitation of liability under the federal statute is a personal defense which cannot be availed of by an insurer under Louisiana law." 419 F.2d at 238. We further found that "the Limitation Act was designed to assist the maritime industry and that it was in no way intended to benefit the insurance industry . . .; the status of insurer is not covered by the public policy underlying the Limitation Act." *Id.*

In *Nebel Towing* we found the Limitation Act to be a defense personal to the ship-owner *because* it would be contrary to public policy to allow the insurer to reduce its liability solely on the basis of the ship-owner's statutory right to limit his liability. In this case London Steam-Ship is attempting to do indirectly, by means of a policy provision (Rule 8(i)), precisely what *Nebel Towing* held the insurer could not do directly.

Because it is contrary to Louisiana public policy for an insurer to reduce its liability to an amount less than the full P & I coverage solely on the basis of the ship-owner's right to limit his liability under the Limitation Act, Rule 8(i) is contrary to public policy. Therefore, Rule 8(i) is invalid and is *not* a valid, effective term and condition of the P & I coverage. The district court did not err.

JOHN R. BROWN, Circuit Judge, dissenting in part:

I concur fully in all of the Court's opinion except the holding that the P & I underwriter is liable in excess of the shipowner's limited liability.

First, I wish to emphasize that while I dissented with some fervor in *Nebel Towing,* 419 F.2d at 238, for the purposes of our present case (and all others like it) I accept the holding and rationale of *Nebel Towing.* In a nutshell my present dissent is the simple one: *Nebel Towing* dealt solely with the contention that the P & I underwriter is entitled to the shipowner's *statutory* right to limit liability. Here the claim is quite different: the P & I underwriter is claiming only that, as prescribed by the Louisiana Direct Action statute, the terms of its own insurance policy limits maximum liability to the dollar amount for which the shipowner-assured would be liable on its successfully maintaining the right to limitation of liability. In *Nebel Towing* the underwriter was claiming the statutory right of the assured; in our present case, it is claiming only the limitation of the insurance policy defense itself. I sum it up as follows:

In *Nebel Towing* the P & I policy did not by its terms limit liability to what the vessel owner's limited liability would be. That meant that the P & I underwriter in its effort to limit its liability had to contend that it, as the insurer, had a right to claim the vessel owner's *statutory* right to limitation of liability. My subsequent analysis of the *Nebel Towing* opinion I think bears this out.

In sharp contrast to that situation, here the London Steam-Ship "excess" P & I policy by Rule 8(i) does have a policy term which limits its liability to that of the owner's

limited liability. This is a *policy,* not *statutory* defense. The P & I insurer is not claiming the owner's *statutory* right to a shipowner's limited liability, but merely the right to assert its *policy* defense.

Such an issue was not the subject of, or involved in, *Nebel Towing* so we are not constricted by that decision in the independent adjudication by this panel.

Without so much as even a genuflect to *Nebel Towing, supra,* the trial court—in a sort of everyone knows a P & I underwriter cannot obtain the benefit of the assured's right to shipowner's limitations of liability—held the P & I underwriter liable for nearly $2,000,000 more than the owners' limited liability.[1]

By the deposition of John Hawkes, director of Bilbrough, it is uncontradicted that London Steam-Ship, the "Club," is an association composed of a number of members, all of whom are shipowners, who, "severally and individually, not jointly nor in partnership, nor the one for the other of them, but each only in his own name" agree to protect and indemnify *each other* in respect of

---

1. The consequence of the trial court's non-articulated adoption of *Nebel Towing* is demonstrated by the fact that under the prime P & I policy, Cherokee's liability is limited to the $1,000,000. The trial court held P & I underwriter *Cherokee* (and owner) liable for $1,000,000 only (see item (b) in table on damages p. 997). That would also have been the result in *Nebel Towing.* There the P & I policy liability limit was $175,000. Had the victim's damages (which had not yet been fixed) exceeded $175,000, there is no indication that this Court would have granted recovery against the P & I underwriter in excess of the fixed dollar limit of the policy.

This means that, as in *Nebel Towing,* the Court accepts the idea that a dollar limitation is acceptable, but one in verbal, ascertainable terms is not.

the vessel entered for protection and indemnity risk in accordance with the Rules.

The deposition of Hawkes—a director of Bilbrough—tracing the history of London Steam-Ship rules from those in 1881-82[2] to 1952-53 and then to those in 1955-56 reflected how the problem of the dollar (pound Sterling) limits of the insurance was recognized.

On reaching the financial condition in which the Association could extend its liability and without the limitation being and expressed in a specific monetary amount per ton (or tons entered), the Association became faced with the problem of determining what, how and in what manner its total liability exposure could be expressed. Beginning in 1955—long before *Nebel Towing*—this is handled by Rule 8(i):

> When a Member for whose account a ship is entered in this Class, is entitled to limit his liability, the liability of this Class shall not exceed the amount of such limitation. . . .[3]

---

2. The 1881-82 Rule 15 provided:

> No Member shall, under any circumstances, be entitled to claim under these rules, in respect or in consequence of any one accident, or event, or occurrence, more than 30 exclusive of costs and charges, upon the entered registered tonnage of the ship in respect of which such claim shall have arisen; and no ship shall at any one time be entered for protection for more than 3,000 tons.

This was continued in the 1952-53 Rules (see Rule 8(h)) except that it deleted the maximum tonnage of 3,000 tons.

3. Rule 8(i) continues to cover the situation in which a vessel is entered for part, not full, tonnage:

> . . . or, if the ship is not entered for her full tonnage, such proportion of the said amount as the entered tonnage bears to the gross register tonnage. . . .

Since there can be no question that this—Rule 8(i)—is one of the ". . . lawful conditions of the policy or contract," it brings us face to face with the critical provision of the Louisiana Direct Action Statute[4] that "any action brought hereunder shall be subject to . . . the *defenses which could be urged by the insurer to a direct action brought by the insured. . . .*" (emphasis added).

We start with our decisions which today are still very intact. For example, *see Degelos v. Fidelity and Cas. Co.*, 313 F.2d 809 (5th Cir.1963)[5] and *Tokio Marine & Fire In-*

---

4. La.Rev.Stat.Ann. 22:655 plainly states:

> It is the intent of this Section that any action brought hereunder *shall be subject to all of the lawful conditions of the policy or contract and the defenses* which could be *urged by the insurer* to a *direct action brought by the insured,* provided the terms and conditions of such policy or contract are not in violation of the laws of this State.
>
> * * * * * *
>
> . . . [t]he injured person or his or her survivors or heirs . . . , at their option, shall have a right of direct action against the insurer *within the terms and limits and [sic] of the policy. . . .*
>
> * * * * * *
>
> *Nothing contained* in this Section *shall be construed to affect* the *provisions* of the *policy* or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be *subject to all of the lawful conditions of the policy or contract* and the *defenses* which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state.

(Emphasis added).

5. *Under the Direct Action Statute,* the case may proceed against the insurer, but *liability depends on legal liability of the assured.* Whether, as the Act permits, the assured is joined with the insurer, *the standard for recovery is identical.*

Degelos, 313 F.2d 809, 815 (emphasis added).

surance Co. v. Aetna Cas. Co., 322 F.2d 113, 1964 A.M.C. 308 (5th Cir.1963).[6]

Not only is the Louisiana Direct Action Statute so precise, so have been the decisions of her courts: there must be a legal liability on part of the assured for the insurer to have a direct action liability. In *Burke v. Massachusetts Bonding & Insurance Co.*, 209 La. 495, 24 So.2d 875 (1946) the question was whether under the law of Mississippi a wife had a right of action against her husband for a tort committed against her in Mississippi for which she can recover against the liability insurer in Louisiana. The Supreme Court stated:

> The statute does not give plaintiff any more rights than she has under the law of Mississippi. It only furnishes her with a method to enforce in Louisiana whatever rights she has in Mississippi. Since she has no cause of action under the law of Mississippi, necessarily Act No. 55 of 1930 confers upon her no cause of action in Louisiana. The mere fact that under the statute plaintiff was able to obtain jurisdiction against her husband's liability insurer in a direct action in this State does not create, as against her husband, *or as against her insurer,* a substantive cause of action that does not exist under the law of the State where the wrongful act occured.

---

6. In *Tokio* the Court stated:

> And we are now clear that the direct action insurer *stands as a party-litigant* in exactly the *same shoes as the assured*. . . . The Louisiana Direct Action Statute emphasizes *that it is the liability of the assured which counts.* See, e.g., "It is the intent of this Section that any action brought hereunder shall be *subject to all of the lawful conditions of the policy or contract* and the *defenses which could* be *urged by the insurer to a direct action brought* by the *insured*. . . ."

322 F.2d at 116-17 & n. 8 (emphasis added).

24 So.2d at 877 (emphasis added). *See also, Hebert v. General Accident Fire & Life Assurance Corp.*, 48 So.2d 107, 108 (La.Ct.App.1950):

> Neither the liability policy on which this suit is based nor Act No. 55 of 1930 makes the insurance company liable merely because of the occurrence of the accident. There is liability in the insurer only if the insured—plaintiff's husband—was guilty of negligence which caused the accident.

Although the trial court, having been *Nebel*-awed, presumably thought that anything which forbade 100% recovery was somehow outlawed, it is plain that application of any such approach would produce absurd results which even the most potent *Nebelizer* would protest.

For example—and there are literally hundreds in the some-time esoteric world of marine insurance—consider this particular P & I cover by the London Steam-Ship Club. By provision 7(b) of the Association Rules liability for damage to any other "ship, boat or craft," is excluded insofar as it is not covered by the usual hull policy with Running Down Clause.[7]

---

7. See Clause 7(b): Excludes liability for:

> Loss of or damage to any other ship, boat or craft, or property on board such other ship, boat or craft, or damages or expenses payable in consequence of or arising out of such loss or damage, including such part of loss or damage in respect of cargo in the entered ship as the owner of such other ship, boat or craft is legally entitled to recover from the Member, so far as the same is NOT covered by the usual form of Lloyd's Policy with the running down clause attached. . . .

This exclusion was not accidental. It has deep roots in maritime insurance history. *See* Palmer, *Liability "As Owner*

(Continued on following page)

Suppose a Louisiana registered steam vessel of 300 tons entered for P & I risk with the London Steam-Ship Club and also covered by the typical marine Hull policy is in a collision in Louisiana coastal waters (not on the Continental Shelf) and severely damages an ocean-going barge. The barge owner files a joint admiralty suit against the offending ship and the London Steam-Ship Club under the direct action statute seeking $100,000 in hull damages. Obviously, this being the classic case since at least 1836 of a liability insured under the ¾ Running Down Clause[8] of the hull policy, the P & I underwriter

---

(Continued from previous page)

of the Vessel Named Herein:" Coverage of Liability of Non-Owners, 43 Tul.L.Rev. 481, 501 (1969):

> British marine protection and indemnity insurance offers the vessel owner and demise charterer coverage for damage caused by the entered vessel for collision damage to the extent of one-fourth (1/4) of the assured's total liability and also to the extent to which the assured's liability exceeds the amount recoverable under the vessel owner's Hull and Machinery and excess liabilities insurance. . . . Under a typical American protection and indemnity policy, the underwriter will cover the liability of the owner of the entered vessel to another vessel if it is not covered by the American Institute TIME (HULLS) form of policy. . . .

And, *see also* Reynardson, *The History and Development of P & I Insurance: The British Scene*, 43 Tul.L.Rev. 457, 470, 467 (1969):

> [a]s we have seen, the Protecting Clubs were formed largely in order to protect owners against collision risks in excess of those recoverable under the ordinary marine policies. . . .
>
> * * * * * *
>
> And so the first Protection Society was formed to cover "extra risks not covered by ordinary marine policies on ships with a collision or running down clause therein."

8. *See*, Schumaker, *The Hull Policy: An Introduction and Brief History*, 41 Tul.L.Rev. 233, 241 (1967).

would have no liability for such hull damages. Under no stretch of the imagination—or the importation of quaint civil law codal provisions—would there be any possible basis for holding the P & I underwriter liable for such damages. Does anyone suppose that any Louisiana court, or one sitting *Erie*-bound as a federal court, would somehow conjure up the idea that this collision-liability-exclusion *(see supra* note 7) is "personal" and hence unavailable to the P & I underwriter as an absolute threshold defense?

On the other hand, suppose the same vessel, entered in the P & I risks of the Club, but also insured with traditional hull cover with Running Down Clause[9] smashes into a dock. Here the claimant, unaware of the security he can obtain by a suit *in rem,* under 46 U.S.C. § 740, files his joint suit against the owner and the hull underwriter—who is, after all, a liability insurer. Would anyone suppose that the usual exclusion of non-vessel damage[10] would be

---

9. To show the complementary nature of P & I and hull insurance, see Proviso 8(a) of the Association Rules:

> 8(a) Every ship entered for protection and indemnity in this Class shall, during the full period of entry, be deemed to be insured for her full value by the usual form of Lloyd's Policy with the Institute Time Clauses Hulls including the Running Down Clause attached. . . .

10. *See* Wright, *Liabilities (1) Arising out of Collison with Another Vessel and Not Covered by the Hull Policy, (2) For Damage to Another Vessel or Her Cargo, Not Caused by Collison with the Insured Vessel, (3) For Damage to Any Object or Property Except Another Vessel or Her Cargo,* 43 Tul.L.Rev. 576 (1969). A typical exclusion for non-vessel property damage in hull running down clause is:

(Continued on following page)

ignored, overruled, or rejected by a Louisiana court or a Louisiana-based federal court?

Before analyzing the impact which these thoughts should have on whether *Nebel Towing* drives this Court to rejecting the ascertainable dollar limit to the P & I underwriters commitment, two further cases warrant comment. The first is *Alcoa Steamship Co. v. Charles Ferran & Co.*, 383 F.2d 46, 1967 A.M.C. 2578 (5th Cir. 1967), *cert. denied*, 393 U.S. 836, 89 S.Ct. 111, 21 L.Ed.2d 107 (1968).[11] There this Court expressly limited the direct action insurer's liability to the shipyard's $300,000 Red Letter Limitation Clause.

The other case is *Ta Chi Navigation (Panama) Corp. S.A. v. United States*, 728 F.2d 699 (5th Cir.1984).[12]

(Continued from previous page)

Provided always that this clause shall in no case extend to any sum which the assured, or the Charterers, or the Surety, may become liable to pay or shall pay for removal of obstruction under statutory powers, for injury to harbors, wharves, piers, stages, structures of any other objects (excepting Vessels and property thereon), consequent on such collision, or in respect of the cargo, baggage or engagements of the Insured Vessel or for loss of life, or personal injury.

11. Kierr, *The Effect of Direct Action Statutes on P & I Insurance, On Various Other Insurances of Maritime Liabilities, and on Limitation of Shipowner's Liability*, 43 Tul.L.Rev. 638, 664-65 (1969) referring to In re Independent Towing Co., 242 F.Supp. 950 (E.D.La.1965), and citing this case, summed it up thusly: "Limitation by contract, as distinguished from *statutory* limitation, is not a personal defense and may be asserted by the insurer." (Emphasis added).

12. Travelers Indemnity Company was surety on an *ad interim* stipulation in a limitation of liability proceeding. In turn it had received an indemnity agreement from the hull under-

(Continued on following page)

If—and the if cannot be a very big one—both Louisiana and local federal courts would recognize these policy defenses as complete defenses to these supposed Louisiana direct action suits against the insurer, the question arises whether there is anything about the wording of Rule 8(i) (see *supra* text at p. 1000 and note 3) which limits liability to the liability of the vessel owner in a successful limitation proceeding which would compel a different result. On the face of the Rule, it is plain and unequivocal. It does not speak in terms of possibilities or even probabilities. It speaks, not in terms of the hypothetical power of a non-vessel owner to claim the benefit of ship-owner limitation of liability (*see infra* note 17, quoting *Nebel Towing*, 419 F.2d at 236 n. 22), rather, it speaks in terms of an insured who is entitled to limit his liability (*see supra* text at p. 1000 and note 3 (Rule 8(i)). Nothing is left to speculation. The trial court, on a full trial—and approved by us—

(Continued from previous page)

writers of the *Ta Chi* vessel. This indemnity agreement provided however:

> The extent of our obligation under this indemnity shall not exceed our liability in accordance with the terms of the policies of insurance. . . .

It was uncontradicted that the *Ta Chi* hull policy (American Institute Hull Clause (January 1970)) expressly provided in the Collision Clause Amendment:

> Provided that this clause shall in no case extend to any sum which the Assured or the Surety may become liable to pay or shall pay in consequence of, or with respect to:
>
> (d) Cargo or other property on or the engagements of the vessel.

Recognizing, without deciding, the dubious character of the indemnity claim against hull underwriters for cargo damage, this Court affirmed denial of Rule 60(b) relief.

has judicially determined that Ingram is entitled to limitation and has fixed that sum precisely to $2,134,918.88.

The only thing possibly standing in the way of this sensible result is *Nebel Towing*. This brings us face to face with our prior celebrated opinion in *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230, 1969 A.M.C. 1571 rehearing denied, 419 F.2d 238 (5th Cir.1969) (en banc), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970). The *Nebel Towing* court precisely prescribed the issue:

> The appellants and the amicus curiae launch a broad scale and many-faceted attack on the district court's holding that Nebel's insurer could not take advantage of Nebel's *right* to *limit* its liability.

419 F.2d at 234 (emphasis added).

The Court was not dealing with a condition or provision of the policy which limited insurer's liability. Rather, it was dealing with the contention that the insurer was entitled to urge the vessel owner's *statutory* right to limit its liability.[13]

---

13. This is amplified by the contentions made in the petitions for rehearing to the panel's opinion:

> 3) The District Court erred in awarding judgment against the underwriters of the M/V G-H, in excess of the limitation value, on the basis of the Louisiana Direct Action Statute. . . .
>
> (Appellant's brief)

And the amicus American Institute of Marine Underwriters:

> 3. Did the district court err in holding that as a matter of Louisiana law, the *limitation of liability accorded to the owner* of the tug G-H was a personal defense, not available to the owner's marine insurer sued directly?
>
> (Emphasis added).

(Continued on following page)

After first disposing of the question reserved in the *Jane Smith, supra,* by holding that there was no unconstitutional conflict between the Louisiana Direct Action Statute and the Federal Limitation of Shipowners Liability Act and the likelihood of increase in actual cost to a vessel owner from higher insurance premiums (see part II) 419 F.2d at 234,[14] the Court (part III)[15] proceeded to determine the P & I underwriter's "remaining contentions [which] depend upon the interpretation of Louisiana law." 419 F.2d at 236. First, the Court on the basis of *Coleman v. Jahncke Service, Inc.,* 341 F.2d 956, 1965 A.M.C. 535 (5th Cir.1965), *cert. dismissed,* 382 U.S. 967, 86 S.Ct. 525, 15 L.Ed.2d 463, *cert. denied,* 382 U.S. 974, 86 S.Ct. 538, 15 L.Ed.2d 465 (1966) rejected out of hand the claim that the no-action clause of the P & I policy forbad direct suit on the policy prior to judgment or payment by the assured. 419 F.2d at 236.[16]

(Continued from previous page)

And even more important is the losing appellant's petition for rehearing en banc:

II.

The Court erred in holding that the *defense of limitation of liability is* a personal defense of the vessel owner and, therefore, may not be availed of by the insurer.

III.

The Court erred in holding that the vessel owner is not denied *the full benefit of the Limitation Act* in the event the insurer is held liable beyond the amount of the limitation fund.

14. London Steamship does not attack these holdings.

15. *See Nebel Towing,* 419 F.2d at 236.

16. London Steam-Ship, accepting the proposition that the no-action clause is no defense, does not challenge this holding.

Since London Steam-Ship Rule 8(i) (*see supra* text at p. 1000 and note 3, and *infra* note 18) has been the target of CZ's attack that *Nebel Towing* requires a like result here, it is important to point out here that the only mention of somewhat similar language in the P & I policy in *Nebel Towing* was in the Court's note 22. Note 22 was in response to the P & I underwriter's contention that the policy did not permit a direct action and the Court mentioned that "the appellants" refer to several clauses of the policy.[17]

This suppositious condition (*see supra* [i] note 17) could have had no significance in *Nebel Towing* since it was uncontradicted that the insured vessel was under bareboat charter to the assured which the Court properly considered as an owner. *See* 419 F.2d 230, 231 n. 1.

I have obtained and carefully considered all of the record and briefs in *Nebel Towing* including the P & I

---

17. Note 22 stated:

> We have considered and rejected the appellants' construction of the other clauses which provide as follows:
>
> [i] It is expressly understood and agreed *if and when* the assured has *any interest other than as a shipowner* in the vessel named herein, in no event shall this Company be liable hereunder to any greater extent than *if the assured were the sole owner and entitled to petition for limitation of liability* in accordance with present and future law.
>
> * * * * * *
>
> [ii] The assured shall at the option of this Company permit this Company to conduct, with an attorney of this Company's selection, at this Company's cost and expense and under its exclusive control, a proceeding in the assured's name to limit the assured's liability to the extent, and the manner provided by the present and any future statutes relative to the limitation of a shipowner's liability.
>
> 419 F.2d at 236 (emphasis added) (brackets [i] inserted).

policy. The P & I policy expressly provided (line 9) that the "amount hereby insured [is] $175,000 as per schedule [of vessels by name as covered], [and] the underwriter . . . hereby undertakes to pay up to the amount hereby insured . . . such sums as the assured, as owner of the [vessels covered] shall become legally liable to pay and shall have paid on account of [enumerated liabilities]."

Unlike London Steam-Ship cover which under Rule 8(i) expressly provided that "the liability" should not exceed the amount of the shipowner's limitation[18], the *Nebel Towing* P & I policy made no reference whatsoever to liability being limited in terms of a shipowner's limitation of liability, but rather expressly provided that the "amount hereby insured" is $175,000.

The only reference in the policy to liability being stated in terms of shipowner's limitation of liability was the clause (lines 99-102 of the policy) quoted in *Nebel Towing*, 419 F.2d at 236 n. 22 and set forth in note 17 *supra*:

> It is expressly understood and agreed if and *when* the assured has any interest *other than as a shipowner* in the vessel named herein, in no event shall this Company be liable hereunder to any greater extent *than if the assured were the sole owner and entitled* to petition for limitation of liability in accordance with present and future law.

(emphasis added).

---

18. Rule 8(i) provides:

> When a member for whose account a ship is entered in this Class is entitled to limit his liability, the liability of this Class shall not exceed the amount of such limitation. . . .

See also supra note 3 and related text.

Thus, in *Nebel Towing* there was nothing in the P & I policy which by words or implication, would limit the P & I underwriter's liability to the owners statutory limitation of liability. Nor was the P & I underwriter making any such claim. In other words, the sole question before the Court and asserted by the P & I underwriter was whether by reason of the Louisiana Direct Action Statute the P & I underwriter had the *right* to claim the benefit of the owner's federal *statutory* right to shipowner's limited liability.

The case, therefore, did not involve a claim that under the terms of the P & I policy there was no liability for amounts in excess of the vessel owner's limited liability. What, and all, it involved was whether, under the Louisiana Direct Action Statute, this non-policy defense of the owner's *statutory* right to limit liability was a defense, and if so, whether it was or was not "personal" to the assured. In other words, the P & I underwriter was contending, not that the terms of the P & I policy itself, as a *policy* defense, limited its liability to that of the owner's statutory right to limit, rather it was contending that this was a federal, *statutory* defense which, under general Louisiana law was not personal to the assured and could be availed of by the underwriter.[19]

Faced with this very precise claim the Court then likened this non-policy, *statutory* defense—claiming the

---

19. This problem of personal-nonpersonal defense brought into play the sometime quaint codal language of La.Civ.Code Ann. art. 2098 (1977):

> A codebtor *in solido*, being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the codebtors.

right to the shipowner's limitation of liability—to other analogous non-policy defenses held by Louisiana courts to be personal.[20] These include such non-policy defenses such as infancy, coverture, charitable immunity, governmental immunity, bankruptcy, etc. that are not available to the insurer.

Faced with this problem then of importing a non-policy defense—not a defense based upon the terms of the P & I policy—but rather the Louisiana concept of the *statutory* defense of a shipowner's right to limit its liability arising in a direct action, this Court plainly held:

> We therefore hold that limitation of liability *under the federal statute* is a personal defense which cannot be availed of by an insurer under Louisiana law.[21]

Nebel Towing, 419 F.2d at 238 (emphasis added).

The Court made clear that in this holding it was dealing with a *statutory*, non-policy defense when it stated that:

> There is no question that the Limitation Act was designed to assist the maritime industry and that it was in no way intended to benefit the insurance industry.

Nebel Towing, 419 F.2d at 238. The Court continued this emphasis by its further statement:

---

20. Of course, what is and is not a "personal defense" under the Direct Action Statute and La.Civ.Code Ann. art. 2098 (1977) *see supra* note 19, is a question committed solely to Louisiana courts. London Steam-Ship does not challenge that holding in *Nebel Towing*.

21. It bears emphasizing that the Court stressed that it was dealing with a defense asserted "under the federal statute" not the P & I policy. *Nebel Towing*, 419 F.2d at 238.

> It is patent that *statutory limitation of liability* is only available to a shipowner; the status of insurer is not covered by the public policy underlying the Limitation *Act*.

Id. (emphasis added).

The result is that *Nebel Towing* dealt solely with an asserted *statutory* defense which the Court, under Louisiana *in solido* principles, held to be "one personal" to the shipowner, not the P & I underwriter. Here, on the other hand, for the very first time this Court faces the problem of a defense based not upon the owner's (assured's) *statutory* right to limit liability, but rather based on the terms and conditions of the P & I coverage itself. This is an issue not previously ruled upon by this Court and as to which this panel ought to be free of restraints to reach its considered judicial decision. To sum it up: this panel for the present case accepts the *Nebel Towing* holdings of this Court that (i) there is no constitutional conflict between the Federal Statutory Limitation of Liability Act and the Louisiana Direction Action Statute, (ii) the P & I policy no action clause is no defense to a claim under the Louisiana Direct Action Statute, (iii) the application of 28 U.S.C. § 1332(c) (1964) is not controlling, and (iv) the *statutory*, non-policy defense of the vessel owner's right to limit liability is a "personal defense," under the Louisiana Direct Action Statute.

But *Nebel Towing*, not being an impediment to unconstricted adjudication, we should be free to, and ought to hold that Rule 8(i) is clear in its meaning and is a valid, effective term and condition of the P & I coverage (*see* items (b), (c) and (d), Table p. 997. The contrary

ruling of the District Court (*see* item (e) $1,813,291.44, Table p. 997) is wrong and the Court should reverse.

I therefore dissent.

SUGGESTION FOR REHEARING EN BANC

Before CLARK, Chief Judge, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS and HILL, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CROWN ZELLERBACH CORPORATION Civil Action
No. 79-93-B
VERSUS
INGRAM INDUSTRIES, INC., ET AL

CROWN ZELLERBACH CORPORATION Civil Action
No. 79-277-B
VERSUS
APEX TOWING COMPANY

(Filed October 28, 1982)

FRANK J. POLOZOLA, District Judge:

This matter is before the Court for a determination of the amount of damages Crown Zellerbach Corporation (CZ) sustained when its water intake structure (structure) was struck by a vessel owned and operated by Ingram Industries (Ingram).

On February 3, 1979, the F.R. Bigelow collided with the plaintiff's structure as it was pushing fifteen loaded barges down the Mississippi River in heavy fog and rain. The F.R. Bigelow was owned and operated by Ingram. Shortly after this accident occurred, CZ began to repair the structure. These repairs were interrupted on May 18, 1979, when the towboat H.R. Zimmerman, owned by Apex Towing Company (Apex) collided with the structure. CZ then filed this suit against various parties to recover damages it sustained as a result of both collisions. All claims against all parties with the exception of Ingram and its insurers have been settled. Ingram has admitted liability for the February 3, 1979 accident but denies lia-

bility for any damages arising from the May 18, 1979 collision.

This civil action is within the admiralty and maritime jurisdiction of the Court pursuant to 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure.

There are several issues which the Court must decide in this case:

(1) Is Ingram liable for the May 18, 1979 accident and, if so, in what amount?

(2) Is Ingram entitled to limit its liability, and, if so, to what amount?

(3) Are Ingram's insurers entitled to limitation of liability?

(4) What is the amount of damages CZ is entitled to recover from Ingram and its insurers as a result of the February 3, 1979 accident?

(5) Is CZ entitled to recover prejudgment interest?

I. THE MAY 18, 1979 ACCIDENT

CZ seeks to hold Ingram liable for the May 18, 1979 accident. However, the Court finds that CZ has failed to prove by a preponderance of the evidence that Ingram is responsible for this accident. The Court finds that the May 18, 1979 accident was caused by the negligence of Apex when its towboat collided with the structure. There is simply no evidence in the record which would show in the slightest manner that Ingram is responsible for the May 18, 1979 accident. Because of the frivolous nature of this claim against Ingram, no extended discussion of this claim is necessary or required. Thus, the Court finds that CZ's claim against Ingram for the May 18, 1979 accident should be dismissed.

II. LIMITATION OF LIABILITY

A. Ingram's claim for limitation of liability.

Ingram contends it is entitled to limit its liability in this case. CZ opposes Ingram's request for limitation of liability. CZ contends that because the officers of the defendant corporation had actual or constructive knowledge of a defect in the vessel which rendered the vessel unseaworthy, Ingram is not entitled to limit its liability. More specifically, CZ contends that the February 3, 1979 accident was caused by the failure of the vessel owner to equip its boat with adequate radar. The Court finds after reviewing the evidence that Ingram is entitled to limit its liability to $2,134,918.88.

CZ argues that the vessel was unseaworthy because the vessel was equipped with two "old Decca radar units" which prevented the captain and crew from seeing the front of the tow visually or on the screen. The evidence presented fails to support this argument. To determine if a vessel is unseaworthy, the Court must determine whether it is fit for its intended use. The vessel need not be accident-proof or equipped with the best possible equipment. There is no evidence in the record to support a finding that Decca radar units such as were used aboard the Bigelow are not still in widespread use. An important element of proof of unseaworthiness because of a failure to supply needed equipment has always been proof of a general custom or usage in the shipping industry of employing the absent item. See, *President of India v. West Coast Steamship Co.*, 213 Fed. Supp. 352, aff'd 327 F.2d 638 (9 Cir. 1964), wherein the court refused to find unseaworthiness because of a lack of radar, because the court

found no general custom or usage of radar at that time. While it may be a general custom to use radar now, there is no evidence presented upon which this Court can find as a matter of fact and law that shippers generally regard a vessel unseaworthy which is not equipped with the latest radar model.

Even assuming that the old radar sets made the Bigelow unseaworthy, the Court finds that this unseaworthiness was not a proximate cause of the accident. The February 3, 1979 accident occurred because the master of the Bigelow negligently cast loose from shore and proceeded into the river in heavy fog while unable to see what was in front of his tow, knowing full well at that time that he couldn't see the tow. The plaintiff would have had a stronger case if it could have shown that the radar was defective in such a way as to deceive the master into believing the way was clear in front of him when in fact there was an obstruction. However, the evidence fails to support this argument. Captain Joe R. Greer, the captain of the vessel, testified that he could not see the front of his tow either visually or on radar at the time he cast loose. Under these circumstances, it was this serious navigational error to proceed which caused the accident. See *C & H Sugar v. Columbia S.S. Co.*, 391 F.Supp. 894, aff'd 510 F.2d 542 (5th Cir. 1972) wherein the court stated:

> The stranding of the Columbia Brewer . . . was due not to a failure to supply the vessel with appropriate charts or to the malfunction of any of the vessel's navigational equipment, but to the failure of the master, Captain Webb, to make proper use of the information available to him and to make reasonable course corrections when he discovered that his vessel was

to the southeast of the island which he intended to pass on the southwest.

510 F.Supp. at 543

Thus, the Court finds that the officers of the defendant corporation did not have active or constructive notice of any defects in the vessel. The Court also finds that the Bigelow was not unseaworthy, but even if it was, such unseaworthiness was not a proximate cause of the accident. Therefore, Ingram is entitled to limit its liability in this case.

B. The amount of the limitation of liability

The Court finds that Ingram is entitled to limit its liability to the sum of $2,134,918.88. It is clear that the barges attached to the vessel as part of the tow are not to be included in the limitation fund. *Liverpool v. Brazil, and Riverplate Steam Navigation Company v. Brooklyn Eastern District Terminal*, — U.S. —, 40 S.Ct. 66, — L.Ed. — (1919). Thus, the Court must determine the value of the Bigelow and the cargo which was on board at the time of the collision. Based on the testimony presented at the trial of this case, particularly the testimony of Richard Vechrock and William Johnson, the Court hereby fixes the value of the Bigelow at $2,040,000.00 and the value of the cargo at $94,918.88. Therefore, the limitation fund is $2,134,918.88. *Signal Oil & Gas Co. v. Barge W-701*, 468 F.Supp. 802 (E.D.La. 1979), aff'd 654 F.2d 1164 (5 Cir. 1981).

C. Are the insurers entitled to limit their liability to the amount of the limitation fund set by the Court

It is too well settled for citation that the insurers are not entitled to limit their liability to the amount of the lim-

itation fund set by the court. The limitation of liability is personal to the insured. Thus, the insurers' request for limitation of liability is denied.

III. THE AMOUNT OF DAMAGES CZ IS ENTITLED TO RECOVER AS A RESULT OF THE MAY 18, 1979 ACCIDENT

The final issue the Court must resolve is the amount of damages CZ is entitled to recover from Ingram and its insurers. The damage claims may be divided into three basic categories:

(a) temporary replacement costs

(b) business interruption damages

(c) permanent replacement costs

A. TEMPORARY FACILITIES

The parties have stipulated that CZ's total claim for temporary facilities is $2,748,359. Of this amount, Ingram disputes $750,242. Thus, the Court must determine whether CZ is entitled to recover all or part of the $750,242 in dispute. There are seven separate categories which make up the disputed $750,242 claim. Each of these seven categories will be discussed separately.

1. Rental Fees

The first disputed item is $177,500.00 which CZ paid to rent pumps, hoses, a barge and crane which were never used but which were kept on site as a back-up in the event the floating temporary water-intake facility which was put into operation immediately after the accident failed. James Pecoraro, Engineering Supervisor at CZ, testified

that the cost of this equipment was about $800 per day, whereas the cost of shutting down the plant because of a failure of the temporary facility would have been about $250,000 per day. Frederick H. Vanderbrook, an engineer who was hired by Ingram soon after the accident and placed on site to monitor that temporary construction and to see that things were done in a reasonable and efficient manner was aware that the equipment was on site and standing idle but made no objection at the time.

It is clear that CZ paid the sum of $177,500 to rent this equipment. The Court finds that CZ acted in a reasonable manner in having this equipment available to avoid the necessity of shutting down the plant. Therefore, CZ is entitled to recover the sum of $177,500.

2. Power Unit

The parties also differ on whether CZ is entitled to recover the sum of $371,286 which was the total cost of the power unit which was built after the accident. This dispute arises in part from the fact that the claim for the power unit can be placed in two different categories, i.e., a claim under temporary replacement costs and a claim under permanent replacement costs. Different legal principles apply to each type of claim.

CZ contends that Ingram should pay $320,000 for this claim, which is CZ's estimate of the cost to build and then remove a separate temorary power unit. Ingram argues that it should only be required to pay $8,251 which represents that portion of the total cost reduced by the useful life of the permanent power unit.

It is agreed that the total cost of the permanent power unit was $371,286. CZ was able to put this permanent power unit into operation quickly as part of the temporary replacement system. It is true that CZ could have built a temporary power unit and then tore it down. It is also true that CZ has an obligation to minimize damages. At the same time, Ingram should not be rewarded for the efficient action taken by CZ in building the permanent power unit. Thus, the Court will divide the $371,286 claim and allow CZ to recover part of this claim as a temporary replacement item and part of the claim under permanent replacement. The Court believes that under the facts of this case, CZ should recover $92,821.50 as a temporary replacement cost. The remaining sum, $278,464.50 shall be placed as an item of recovery under permanent replacement costs and be subject to a depreciation factor the Court must apply to permanent replacement costs claims.

3. Barge Rental

CZ also claims $72,576 as fair rental value for a barge which was required to hold the temporary replacement pumps and related equipment. CZ had owned this barge prior to the accident but the barge had not been used for years prior to the accident. After the accident, Ingram spent substantial sums of money to rehabilitate the barge for use with the pumps. CZ will reap the benefits of these improvements. There is no evidence that any other use would have been made of the barge during the time it was used in connection with the repair operations. There is no

evidence that CZ lost any income from using the barge. Therefore, the Court finds that CZ is not entitled to recover the $72,576 from Ingram.

4. Pumps

During the repair operations, a temporary pump barge was used which originally had four pumps. After six months of operation, a fifth pump was added at a cost of $70,370. Although Ingram contends the fifth pump was unnecessary, the Court finds that there is adequate evidence in the record to support CZ's decision to add a fifth pump. CZ's desire to ensure an adequate water supply to operate the plant and its concern over the wear and possible breakdown of the pumps more than justify its decision to add an additional pump. Thus, CZ's claim for $70,370 will be granted.

5. Photographs

The next item in dispute pertains to a claim in the sum of $5,152 for photography. Although Ingram claims these photographs were taken for use in litigation, the Court finds that photographs were routinely taken by CZ on major capital projects. Therefore, the Court will allow CZ to recover $5,152 for expenses incurred in taking the photographs.

6. PALA Charges

Ingram objects to a claim CZ makes for $26,609 for charges set forth on an invoice submitted by PALA, a mechanical contractor employed by CZ. The evidence reveals that this claim is related to the repairs and is recoverable.

7. Salvage

The final item of dispute on temporary repair costs is a bill from Potashnick for $91,860 for salvage. Ingram objects to $35,000 of this claim on the ground that this sum is attributable to the salvage of the No. 5 protective dolphin. It is clear that after the water-intake structure was destroyed, the No. 5 dolphin became a hazard to navigation. When CZ made its decision to rebuild the structure ashore rather than in the river, it became necessary to remove the No. 5 dolphin. The expense of removing the No. 5 dolphin is directly related to the destruction of the structure by defendant's vessel and, therefore, must be paid for by Ingram. Therefore, CZ shall be allowed to recover $91,860 for salvage operations.

8. Recapitulation of Temporary Facilities Charges

Stipulated amount not in dispute	$1,998,117.00
Rental fees for pumps, hoses, barge and crane	177,500.00
Power unit	92,821.50
Pumps	70,370.00
Photographs	5,152.00
PALA charges	26,609.00
Salvage	91,860.00
	$2,462,429.50

B. BUSINESS INTERRUPTION LOSS

CZ has submitted a claim for business interruption loss in the sum of $841,312. Ingram admits that CZ is entitled to recover for this business interruption loss but strenuously disputes CZ's right to recover the total amount claimed. There are five areas in dispute on the business interruption loss claim and each will be discussed separately.

1. Production Loss

At the time of the accident, CZ had four machines in operation. As a result of the accident, the machines were completely or partially shut down for several days following the accident. CZ's estimate depends on the assumption that its four machines were operated at full capacity all year and that all of its production was sold. Ingram admits this to be true on two of the four machines. Ingram disputes this fact on machines three and four. CZ's production statistics (Ingram Exhibit 27) clearly show that machines three and four were not operated on a continuous basis in any year preceding the accident. All sales of products made by machines three and four during the shutdown were filled from inventory. There is no evidence in the record that sales were lost because of the interruption of production on machines three and four. Therefore, the claim of $299,472 for lost production from machines three and four is disallowed. *Bolivar County Gravel Co. v. Thomas Marine*, 585 F.2d 1306 (5 Cir. 1978).

2. Cost of Maintaining Plant

Ingram objects to CZ's claim for costs incurred in maintaining the plant during the time production had stopped. Ingram contends that several items listed by CZ's accountant as fixed items of expense, were in fact variable expenses and should have been controlled by CZ. The major item of expense is labor costs. These labor costs include costs incurred in maintaining the machines which were shut down by the accident. Ingram argues that the crews should have been sent home during the shutdown. CZ correctly argues that the emergency increased its need for manpower and that all persons on duty and

being paid were doing necessary work. Therefore, Ingram's objection to the method of calculating these costs is without merit.

3. Repair Materials

CZ included the sum of $46,965 for repair materials in its business interruption claim. These materials were used in connection with the routine maintenance that CZ had at its plant. The scheduled maintenance was done at the time the plant was shut down. Because it is necessary to perform the scheduled maintenance at CZ's plant, Ingram should not be required to pay for repair materials used in connection with the maintenance procedure merely because the maintenance was conducted during the shutdown caused by the accident. Therefore, CZ's claim for $46,965 is denied.

4. Depreciation Allowance

CZ claims $49,433 for a depreciation allowance on the machinery. The Court cannot accept CZ's contention that CZ's machines lost any value during the few days production was interrupted. While the straight line depreciation is acceptable for tax purposes, there is no evidence that this machinery was depreciating in value because of the accident. CZ's claim for $49,322 for a depreciation allowance is denied.

5. Recapitulation of Business Interruption Loss

Total amount claimed		$841,312
Less: Production loss for machines 3 and 4	$299,472	
Repair materials	46,965	
Depreciation allowance	49,322	
Total deductions		395,759
Total allowed for business interruption loss		$445,553

C. PERMANENT IN-KIND REPLACEMENT COSTS

1. Power Unit

The Court has previously discussed the amount which CZ is entitled to claim as a permanent in-kind replacement cost for the power unit (See par. III(a)(2)). For reasons previously given, the amount to be included as a permanent replacement cost for the power unit is $278,464.50. Because the Court has included this amount for the power unit, the amount set forth in the Fowler estimate for electrical work must be adjusted as discussed hereinafter.

2. Water-intake Structure

A major category of the damages assessed against Ingram is the in-kind replacement of the water-intake structure as it existed prior to the accident of February 3, 1979. The structure was completed in 1964 and consisted of a pile supported concrete decked platform which

measured 39′ x 96′ with three electrically operated vertical pumps, each with a capacity of 16,000 gallons per minute. Also located on this platform were the electrical transformers and switch gear for the pump motors, an overhead crane for servicing the pumps, and a 52″ pipe manifold carrying water back to the plant. Two trussed walkway sections served as access to the platform and a piperack for the pipe and conduit. There were four upstream dolphins which supported a drift boom which was intended to ward off floating debris from the platform. A hydrographic survey done by CZ revealed that the river bottom was fairly stable and would not make any substantial changes in the near future which could damage the structure. There was, however, considerable bank erosion some two to four thousand feet downstream from the structure which was expected to continue. The structure was basically sound and had withstood high waters in 1973 and 1975. There had been no physical damage to the structure itself prior to February 3, 1979. A runaway barge had damaged two of the protective dolphins in a previous accident which occurred in 1975 when an empty Lambert Gravel barge broke loose and collided with number two and number three dolphins causing the number two dolphin to lean. This dolphin was repaired by driving guide pilings to brace it. In 1973, swaying movement of the structure was determined to be a problem. CZ corrected this by securing the structure with cables to an anchor in the river and to a concrete deadman on the shore. A report done by CZ in 1973 showed that there was substantial corrosion of the structure. The structure was painted in 1975 but the job was poorly done. In May of 1973, the number five dolphin was apparently

swept away by the current. No effort was made to replace this dolphin. (Ingram Ex. 35).

The drift booms were not in place and functioning prior to the February 3, 1979 accident.

Much evidence was presented on the cost of rebuilding the intake structure. The Court finds that the estimate of Hardy Fowler which is set forth in CZ exhibit number 20, is reasonable and supported by the facts of the case. According to Fowler, the costs for rebuilding the structure is as follows:

Structural repairs	$ 798,378
Mechanical repairs	634,985
Electrical repairs	144,576
Subtotal	$1,577,939
Engineering fee	23,500
Total estimate of cost	$1,601,439

The Fowler figures must be adjusted for certain items the Court has determined should be included or excluded from the estimate.

(a) Drift Booms

The Fowler estimate included $20,518 for drift booms. However, it is clear that the drift booms had disappeared prior to the accident. Furthermore, the evidence revealed that the drift booms were as much a burden as they were a benefit. Because plaintiff has failed to carry the burden of proving that the drift booms were in place and operating at the time of the accident, $20,518 must be deducted from the Fowler estimate.

(b) Wood Dolphin

Included in the Fowler estimate was a claim for replacing the wood dolphin. However, this claim of $13,941 must be rejected. The wood dolphin was bent under the surface of the water in 1973. There is no evidence to show that defendant damaged this dolphin.

(c) Costs of Pumps

Fowler estimated that the cost of the replacement pumps to be $212,445. However, the actual cost to CZ was later determined to be $184,665. Therefore, $27,780 must be deducted for this item.

(d) Electric Motors

The parties have agreed that $90,000 should be deducted from the Fowler estimate for the cost of electric motors.

(e) Site Clearance

The Court has determined that $5,000 is an appropriate award for clearing the site in preparation for replacement of the structure. Therefore, $5,000 should be added to the Fowler estimate.

(f) Stand-By Equipment

This claim of $5,000 for stand-by equipment has already been included in the temporary facilities category and, therefore, should be deducted from the permanent in-kind replacement category.

(g) Field Costs and Engineering

The Court has determined that $20,000 for engineering and $5,000 for job clean-up, handling and storage, and

start-up costs are appropriate awards. These costs were not included in the Fowler estimate and, therefore, $25,000 must be added to the Fowler estimate.

(h) Sales Tax

No adjustment need be made for sales tax as Fowler took sales tax into account in his estimates.

(i) Credit for Power Unit

The electrical estimate must be adjusted downward because of the amount the Court has awarded for the permanent electrical facility. Thus, the Court shall deduct $88,300 from the Fowler estimate.

(j) Recapitulation of the Fowler Estimate.

Original Fowler Estimate		$1,601,439
Less:		
Drift booms	$20,518	
Wood dolphins	13,941	
Cost of pumps	27,780	
Electric motors	90,000	
Stand-by equipment	5,000	
Electrical to Power Unit	88,300	
Total deductions		245,539
Subtotal		1,355,900
Add:		
Site clearance	$ 5,000	
Field costs & engineering	25,000	
Total additions		30,000
Pre-Depreciation Adjusted Fowler Estimate		$1,385,900

3. Recapitulation of Pre-Depreciation Permanent In-Kind Replacement Cost

Adjusted Fowler Estimate	$1,385,900.00
Power Unit (pro-rata share)	278,464.50
Total Pre-Depreciation Permanent In-Kind Replacement Costs	$1,664,364.50

4. Depreciation

In *Freeport Sulphur Co. v. S/S Hermosa,* 526 F.2d 300 (5 Cir. 1976), the Fifth Circuit Court of Appeals set forth the method for computing the amount of depreciation on the structure. The Court has followed the *Freeport Sulphur* case in computing the depreciation in this case.

There was conflicting evidence over the length of the useful life of the structure. James Pecora, a CZ employee, testified that the useful life of the structure when it was completed was expected to be between 40 and 60 years. The report done by Lanier and Associates estimated the useful life of the structure to be 30 years. After reviewing the evidence and in particular evidence of similar structures built along the Mississippi River, the Court finds the useful life of the CZ structure to be 40 years.

Thus, in computing the amount which CZ is entitled to recover for permanent in-kind replacement, the Court must take into consideration the age of the structure at the time of the accident, the useful life of the structure and the total permanent replacement costs. The depreciation computation is as follows:

$15/40 \times \$1,664,364.50 = \$624,136.69$

Therefore, CZ is entitled to recover $1,040,227.81 ($1,664,364.50 less depreciation of $624,136.69) for total permanent replacement cost.

D. TOTAL OF DAMAGE RECOVERABLE

A summary of the damages CZ is entitled to recover in this case is as follows:

Temporary replacement facilities	$2,462,429.50
Business interruption loss	445,553.00
Permanent in-kind replacement	1,040,227.81
Total damages	$3,948,210.31

The Court has considered all of the claims of the parties whether discussed herein or not and finds that the total damages to be recovered by the plaintiff is $3,948,210.31.

E. PRE-JUDGMENT INTEREST

The final issue for the Court to determine is whether the plaintiff is entitled to pre-judgment interest, and if so, from what date should the interest run. Although the award of pre-judgment interest is within the Court's sound discretion, it "is well-nigh automatic in suits in the admiralty." *Masters v. Transworld Drilling Co.*, — F.2d — (5 Cir. Oct. 12, 1982); *Havis v. Petroleum Helicopters*, 664 F.2d 54 (5 Cir. 1981); *Annot., Award of Pre-Judgment Interest in Admiralty Suits*, 34 A.L.R. Fed. 126, 228-38 (1977). In the Fifth Circuit, the courts have generally adopted the view that interest on property damages is awarded from the time of the accident unless there are peculiar or exceptional circumstance to award interest

from another date. *American Oil Co. v. M/T Lacon*, 398 F.Supp. 1181 (D.C.Ga. 1973), aff'd 518 F.2d 1405 (5 Cir. 1974); *Mobil Oil Corp. v. Tug Pensacola*, 472 F.2d 1175 (5 Cir. 1973). The Court finds that plaintiff is entitled to pre-judgment interest in this case. The Court further finds that because of the peculiar and exceptional circumstances involved in this case, the pre-judgment interest should run from December 11, 1980 and not from the date of the accident. The plaintiff's structure was struck by Ingram's vessel on February 3, 1979. The structure was hit a second time on May 18, 1979 by another party's vessel. There is evidence in the record of disputes between the parties over which accident caused certain damages to the structure. There was also a labor strike at the plant which added to the confusion. This confusion was all but eliminated after the Court held a series of pre-trial conferences with the parties and required the parties to itemize the damages sustained, attach data to support the claim and exchange all information on the damage claim. A status conference was held in this case on December 11, 1980 on the issue of quantum. A formal stipulation on damages was filed in the record on March 20, 1981. The Court believes that under the facts of this case pre-judgment interest should run from December 11, 1980.

Since this judgment is being rendered after October 1, 1982, the rate of interest must be fixed in accordance with the Federal Court Improvement's Act of 1982 (Section 302, amending 28 U.S.C. 1961) (Act). This Act requires civil money judgments awarded in district courts to bear interest "at a rate equal to the coupon issue yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills

settled immediately prior to the date of judgment." The certified rate by the Department of Treasury for judgments rendered between October 1, 1982 and October 28, 1982 is 10.41% per annum. 28 U.S.C. 1961 also provides in part that "[s]uch interest shall be calculated from the date of entry of judgment." Thus, the Court must decide whether § 1961 precludes the Court from granting pre-judgment interest. After reviewing the Legislative History and purpose of the Federal Court Improvement's Act, 1982 U.S. Code Cong. and Adm. News, p. 11, et seq, the Court concludes that Congress intended for the Act to apply to all cases where post judgment interest is to be awarded, but the Act does not preclude the Court from granting pre-judgment interest if pre-judgment interest is otherwise allowed.

Senate Bill 1700 provided legislation for pre-judgment interest. Senate Report No. 97-275 which accompanied S.1700 explains the purpose of providing legislation to set forth guidelines in awarding pre-judgment interest. See 1982 U.S. Code Cong. and Adm. News, pp. 21-22 and 40. House Bill 4482 did not provide for pre-judgment interest. H.R. 4482 was passed in lieu of S.1700 after the bill was amended to contain much of the language of the text of S.1700. However, 28 U.S.C. 1961 as passed by the Congress failed to include language dealing with pre-judgment interest. Because the Congress failed to include language dealing with pre-judgment interest, the Court must conclude that Congress did not intend to change the current jurisprudence which allows Courts under certain circumstances to award pre-judgment interest. Prior to the passage of the Act, there were no uniform guidelines for the Court to follow in awarding pre-judgment inter-

est. Since the Act did not include any guidelines for awarding pre-judgment interest, the Court must conclude that had Congress intended to provide guidelines for awarding pre-judgment interest, it would have done so in the Act. However, when it struck the language in S.1700 which provided guidelines for pre-judgment interest, the Congressional intent was to provide guidelines only for post judgment interest and not to change existing jurisprudence which pertained to pre-judgment interest. This conclusion is supported by the following language from Senate Report 97-275; p. 21-22 and 40.

> *There are presently no generally applicable guidelines concerning the award of prejudgment interest in Federal courts.* Yet such interest may be essential in order to compensate the plaintiff or to avoid unjust enrichment of the defendant. For instance, a plaintiff who is unlawfully deprived of the use of $20,000 in 1976 and who does not receive a judgment until 1979, could have obtained $4,500 in those three years by investing the money at seven percent compounded interest. The bill provides that, where a defendant knew of his liability, interest be awarded for the prejudgment period at a rate that is keyed to the prime interest rate, where this is necessary to compensate the plaintiff. The imposition of such interest would be left to the discretion of the district judge in each case.
>
> Finally, the Committee took this opportunity to consolidate into one statute the three provisions of Title 28 of the United States Code dealing with the award of interest on judgments. Consequently the provisions of this bill for prejudgment interest and a new interest rate on judgments will apply uniformly to suits between private litigants and to suits against the government. (Emp. Supplied)

* * *

Section 302.—Under current law, the interest rate granted on judgments during appeal is based on varying State laws and frequently falls below the contemporary cost of money. As a consequence, a losing defendant may have an economic incentive to appeal a judgment solely in order to retain his money and accumulate interest on it at the commercial rate during the pendency of the appeal.

Section 302 amends 28 U.S.C. 1961 by setting a realistic and nationally [sic] rate of interest on judgments in the Federal courts. The provision would tie the postjudgment interest rate to the rate used by the Internal Revenue Service for delinquent taxes under 26 U.S.C. 6621. That rate is a composite of prime rates from throughout the country that is reviewed and revised periodically. Furthermore, by consolidating all the provisions for interest on judgments of Title 28 into this section, this rate becomes uniformly applicable to all litigation in the Federal courts.

There are presently no generally applicable guidelines concerning the award of prejudgment interest by Federal courts. Yet such interest may be essential in order to compensate the plaintiff or to avoid unjust enrichment of the defendant. For instance, a plaintiff who was unlawfully deprived of the use of $20,000 in 1976, and who did not receive a judgment until 1979, could have obtained $4,500 in the three-year intervening period by investing the money at 7 percent compounded interest. (Emp. Supplied)

In the Congressional Record, December 8, 1981, at S 14699, Senator Grassley states:

Third, the amendment strikes out the provisions relating to prejudgment interests. This matter was not addressed in testimony or evidence submitted to the court's subcommittee during the course of its hearings on S.1700 this year, but was a carryover from prior versions of the bill. In response to the

> concerns expressed by OMB and on further examination by committee staff, it seemed that this matter should be given more thorough attention before enactment into law.
>
> Thus, the entire prejudgment interest provision has been stricken by this amendment. It is this Senator's intention that this action be done without prejudice on the merits of the issue. It is anticipated that the subcommittee will consider the question in the coming months so as to be able to explore all facets of the matter and give it careful consideration prior to any further legislative activity.

At page S 14701 of the same record, Senator Specter states:

> Mr. President, I had intended to press an amendment to prejudgment interest which I will defer out of respect for the absence of the Senator from Kansas and on the assurance of the Senator from Kansas (Mr. Dole) that there will be hearings on the issue of prejudgment interest. I think ultimately we need that legislation in order to encourage settlements and to avoid having defendants delay cases in which there is no prejudgment interest.

Thus, the Court finds that plaintiff is entitled to post judgment interest at the rate set by the Act, 10.41% per annum. The Court also finds that plaintiff is entitled to pre-judgment interest from December 11, 1980 to the date of judgment. Since no rate is provided for in admiralty law or the federal statute, the Court may look to state law to determine the interest rate to be applied. Under Louisiana law, the applicable interest rate from September 10, 1980 to September 11, 1981 was 10% per annum. The rate changed to 12% on September 11, 1981. Because the post judgment interest rate set forth by the Act is 10.41%

and since this 10.41% rate is between the two applicable state interest rates, the Court believes that a pre-judgment interest rate at the same rate as the post judgment interest rate, i.e., 10.41%, would be proper and equitable under the facts of this case. Therefore, the Court finds that plaintiff is entitled to interest on its award at the rate of 10.41% from September 10, 1980 until the judgment is paid.

Therefore:

IT IS ORDERED that judgment be rendered in favor of the plaintiff, Crown Zellerbach Corporation and against Ingram Industries, Inc., Cherokee Insurance Company, Lloyds Underwriters, Several British Insurance Companys and London Steamship Owners Mutual Insurance Association, Ltd., London, in the sum of $3,948,210.31, together with interest at the rate of 10.41% per annum from December 11, 1980 until paid and all costs of these proceedings.

IT IS FURTHER ORDERED that judgment be rendered in favor of Ingram Industries, Inc. limiting its liability in this case to the sum of $2,134,918.88.

Judgment shall be entered accordingly.

Baton Rouge, Louisiana, October 28, 1982.

/s/ Frank J. Polozola
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3749

D. C. Docket No. CA-79-93-B

CROWN ZELLERBACH CORPORATION,

Plaintiff-appellant
Cross-Appellee,

versus

INGRAM INDUSTRIES, INC., ET AL.,

Defendants-Appellees,

and

LONDON STEAMSHIP OWNERS' MUTUAL INSURANCE ASSOCIATION, LIMITED,

Defendant-Appellee
Cross-Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

---

Before CLARK, Chief Judge, BROWN, THORNBERRY, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part, reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

March 5, 1986

THORNBERRY, Circuit Judge, specially concurring.

TATE, Circuit Judge, with whom RUBIN, POLITZ, JOHNSON, and WILLIAMS, join, dissenting.

ISSUED AS MANDATE:

STATUTES INVOLVED

1. The Louisiana Direct Action Statute, La. R.S. 22:655 provides:

> No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person, or his or her survivors mentioned in Revised Civil Code Article 2315, or heirs against the insurer. The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido, in the parish in which the accident or injury occurred or in the parish in which an action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this State. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which

could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State.

It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable; and that it is the purpose of all liability policies to give protection and coverage to all insureds, whether they are named insured or additional insureds under the omnibus clause, for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy.

2. 46 U.S.C. § 183(a) provides:

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

3. La. Civ. Code Art. 1801 provides:

A solidary obligor may raise against the obligee defenses that arise from the nature of the obligation, or that are personal to him, or that are common to all the solidary obligors. He may not raise a defense that is personal to another solidary obligor.